

Race and sex discrimination

A practical UNISON guide to identifying unlawful discrimination

Edition 5

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Introduction

The need for this guide was identified during specialist training sessions attended by UNISON reps on race and sex discrimination law. This booklet provides an introduction and practical guide to the legal concepts of discrimination. The main purpose is to help UNISON officials and lay activists spot hidden as well as obvious forms of discrimination, and to recognise what evidence is helpful in making a legal case. The checklists in the guide provide some basic pointers to how discrimination law works, but they are not intended to be totally comprehensive.

This guide does not give any substantial guidance on how to run a discrimination case in an employment tribunal. More guidance on law and procedure is necessary before running a case. This is available in other publications listed in the Resources section at the end of the guide.

The Equality Act 2010 forbids ‘race’ discrimination, which it defines as meaning colour, nationality, and national or ethnic origins. This means that workers from many different backgrounds will be able to make claims to an employment tribunal. When bringing a legal claim, the member will need to identify on what basis s/he feels s/he has been discriminated against, eg is it because s/he is black as opposed to white; black and of African nationality as opposed to black British; Polish as opposed to non-Polish or British?

This guide uses the term ‘race’ and ‘race discrimination’ because that is the terminology of the Equality Act. In other contexts, many people would prefer to talk about ‘ethnicity’.

Although the law requires precision, in policy terms, UNISON uses the word ‘Black’ to refer to ‘black’ and ‘minority ethnic’ workers collectively. Black with a capital ‘B’ is used in its broad political and inclusive sense to describe people in Britain who have suffered colonialism and enslavement in the past and continue to experience racism and diminished opportunities in today’s society.

The use of these collective terms in the booklet must not be taken to be obscuring important differences between and within all the groups of different backgrounds who may suffer race discrimination.

While race discrimination against white workers is also prohibited, the history of the legislation shows that the original Race Relations Act was brought in specifically in response to evidence that black and other minority ethnic groups experience race discrimination in the workplace.

Similarly, although the Equality Act prohibits discrimination against men as well as against women,

statistically sex discrimination has affected many more women than men.

This guide therefore most frequently gives examples of discrimination against women. It should also be remembered that black women are often doubly discriminated against.

If you have a member experiencing discrimination, why not see if they are in touch with UNISON’s self-organised groups which include groups for Black members; LGBT+ members; and women members. These groups meet locally and nationally to discuss, campaign and organise around the specific issues that affect them. They help UNISON understand equality and meet our equality aims. Find out more here:

unison.org.uk/about/our-organisation/member-groups

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The UNISON guidance notes referred to in this guide have been added by UNISON.

Further copies of this guide are available by emailing learningandorganising@unison.co.uk and quoting Stock ref. ACT152.

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Part one: A Guide to the Equality Act

1 The legal framework

The legislation

The law against race discrimination at work used to be contained in the Race Relations Act 1976. The law against sex discrimination at work used to be set out in the Sex Discrimination Act 1975. Where it concerned sex discrimination in pay or contract terms, it was contained in the Equal Pay Act 1970. Now all these different statutes have been replaced by the Equality Act 2010.

The Equality Act 2010 (referred to in this guide as the EqA) forbids discrimination based on certain 'protected characteristics'. This guide looks at the protected characteristics of race, sex, gender reassignment, being married or a civil partner, pregnancy and maternity. The other protected characteristics in the EqA are age, disability, religion and belief, and sexual orientation.

European law also forbids race and sex discrimination in the Treaty and various Directives. The final decision as to what is required by European Union (EU) law is made by the European Court. This used to be called the European Court of Justice (ECJ), but it now tends to be referred to as the Court of Justice of the European Union (CJEU).

Although the exact effect of Brexit remains to be seen, the EqA should provide essentially the same protection as European law as long as it is left intact.

The Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) was set up in 2007. It replaced the previous Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission, which are now referred to as the 'legacy commissions'.

The EHRC has responsibility for all the protected characteristics under the EqA as well as a role in relation to human rights, although it cannot run cases which are purely to do with the Human Rights Act. In theory, the EHRC has an educational as well as an enforcement role, and can take on strategic cases and conduct inquiries. In practice, its formal powers, budget and staff have been severely reduced by successive governments.

The EHRC has an interesting and informative website, which is listed in the Resources section at the end of this Guide.

The Codes of Practice

The EHRC has issued two statutory Codes of Practice, which apply in England, Scotland and Wales:

- The Employment Code
- The Equal Pay Code

The Codes are available on the EHRC website via links at equalityhumanrights.com/publications/guidance-and-good-practice-publications/codes-of-practice

Make sure you look at the pdf version of the Employment Code rather than the word version of the Code, since the latter has some mistakes in its paragraph numbering.

The Codes do not impose legal obligations in themselves and they do not purport to be an authoritative statement of the law. Nevertheless, tribunals must take into account any relevant provision in the Codes.

The Employment Code is extremely long (over 200 pages), but you can use the index to find your way around. Part 1 sets out the law with different chapters, eg on direct discrimination, indirect discrimination, victimisation, harassment and positive action. Part 2 gives guidance on the law and good practice in recruitment, during employment, in equality policies and practice, and when terminating employment.

It is a good idea to read through the Code and make your own index of sections which you find helpful. Some sections which may be relevant to the subjects of this guide are:

- paras 2.21 – 2.30: gender reassignment
- paras 7.1 – 7.20: harassment
- paras 17.8 – 17.12: flexible working
- paras 17.25 – 17.32: absences related to pregnancy; gender reassignment; in vitro fertilisation; and family leaves
- paras 17.44 – 17.51: language in the workplace

Employment tribunals

Individuals can bring cases of race and sex discrimination against their employers in an employment tribunal. These are the same tribunals that hear unfair dismissal cases.

Who is protected by the EqA?

The EqA covers more workers than unfair dismissal law. There are two big differences:

- For ordinary unfair dismissal, a member must have been continuously employed by the employer for at least two years. Under the EqA, no minimum length of service is required.
- To claim unfair dismissal, it is necessary to be an 'employee'. It is sometimes difficult to know whether or not a member fits the legal definition of an employee. This is not a subject covered by this guide, but by way of example, it can lead to uncertainty if the employer is not legally obliged to offer any work at all for certain periods. Under the EqA, these technical problems do not arise. This is because, as well as employees, the following workers are also protected:
- Individuals working on a contract personally to do work. This is very similar to 'workers' covered by the Working Time Regulations and National Minimum Wage.
- Job applicants.
- Work-trainees.
- Contract workers.

This last category covers discrimination by a 'principal' against a worker supplied by another organisation (the employer) under a contract between the principal and the other organisation. It can be difficult to know exactly who is covered, but usually it will cover:

- Discrimination by a local authority against employees of a contract cleaner or caterer.
- Discrimination by an NHS Trust against Agency employees supplied to work for the Trust under a contract between the Trust and the Agency.

Race

Under section 9, an employer must not discriminate in relation to 'race' which covers:

- colour
- nationality
- national origin
- ethnic origin.

The EqA protects everyone from race discrimination, whatever their ethnic background. For example, a member must not be discriminated against

- because s/he is black or because s/he is white
- because s/he has French or Algerian or British nationality
- because s/he was born in Italy or Kenya or Ireland or England.

'Ethnic origin' is recognised to cover discrimination against a worker because s/he is Sikh or Jewish.

The EqA also forbids religious discrimination. Race and religious discrimination are sometimes closely related. Members who are discriminated against because they are Sikh or Jewish can claim race and/or religious discrimination.

A person can belong to a racial group which consists of more than one distinct racial group. For example, a member might be discriminated against because s/he is black and of Nigerian national origin, as opposed to black and of British national origin.

Sex

Under section 11, an employer must not discriminate against a member because she is a woman or because he is a man.

Marriage and Civil Partnership

Under section 8, a member must not be discriminated against because s/he is married or a civil partner. The EqA does not forbid discrimination against a worker because s/he is not married or a civil partner.

Discrimination related to sexual orientation is also unlawful, although it is not the subject of this guide.

Gender reassignment

Under section 7, a member will have the protected characteristic of 'gender reassignment' if s/he is proposing to undergo, is undergoing, or has undergone a process (or part of a process) of reassigning his/her sex by changing physiological or other attributes of sex. This process need not be under medical supervision.

The EqA refers to someone with the protected characteristic of gender reassignment as a 'transsexual' person. However, this is often considered offensive and it is not UNISON's preferred term, as we discuss further at page 48, but for legal purposes, it is necessary to be aware of the language used in the EqA.

The legal meaning of race and sex discrimination

There are four types of discrimination set out in the EqA which apply to the protected characteristics of race, sex, being married or a civil partner, or gender reassignment:

- Direct discrimination – section 13
- Indirect discrimination – section 19
- Victimisation – section 27
- Harassment – section 26

Each of these types of discrimination has a precise legal meaning. In summary:

Direct discrimination is where the member is treated less favourably because of his/her race or sex or because s/he is married or a civil partner or because s/he is proposing to undergo, is undergoing or has undergone gender reassignment.

For example:

- A black worker is not treated the same way as he would have been if he was white.
- A woman is not treated the same way as she would have been if she were a man.
- A married person is not treated the same way as she would have been if she was unmarried.

Direct discrimination also applies where a member is treated less favourably, not because of his/her own race or sex etc but because of the race or sex of someone else.

For example: In a racist workplace, a manager not only treats the black employees less favourably, but also treats the member – who is white – less favourably, because she is friendly with the black employees.

This is sometimes called ‘discrimination by association’ or ‘associative discrimination’.

Direct discrimination is also unlawful if the member is treated less favourably because the employer wrongly perceives him/her to have a particular protected characteristic.

For example: the member is not shortlisted for a job because her name suggests that she is black African. In fact, it is her husband’s name and she is white British.

There is no justification defence to direct race or sex discrimination. (There is generally no justification defence to direct discrimination for any protected characteristic except direct age discrimination.)

Points to note:

- *The employer’s motive is irrelevant. If a manager has treated a black worker or a woman or a married worker less favourably because of race or sex or marital status, then there is no defence that s/he did not intend to do so or that s/he had good motives.*

- *There are some limited exceptions for occupational requirements (OR) and for positive action.*

A fuller explanation of the meaning of direct discrimination is on pages 10-14 and of the Occupational Qualification and positive action exceptions on page 25.

Indirect discrimination is where a provision, criterion or practice (‘PCP’) is applied which puts workers of a certain race at a particular disadvantage compared with those not of that race, or puts women at a particular disadvantage compared with men, or married or civil partners at a particular disadvantage compared with those who are not married or civil partners.

For example:

- A requirement for English Language GCSE could disqualify many foreign-born workers from employment.
- A criterion that workers be at least 6 feet tall would have adverse impact on women, since proportionally fewer women than men are 6 feet.

Point to note:

Provisions, criteria and practices which can be objectively justified are not unlawful indirect discrimination.

A fuller explanation of the meaning of indirect discrimination is on pages 14-20.

Victimisation is where a worker is treated unfavourably because s/he has previously complained of race or sex discrimination or given evidence for another worker in a discrimination case or done another ‘protected act’.

For example:

- *An employer sacks a worker because he complained of race discrimination in a grievance.*
- *An employer refuses to promote a female worker because she complained that she was paid less than a male colleague.*
- *Point to note:*
- *It is a defence for the employer if the worker made a false allegation and the allegation was made in bad faith.*

A fuller explanation of the meaning of victimisation is on pages 22-24.

Harassment is where the harasser engages in unwanted conduct which has the purpose or effect of violating the worker’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her. For more detail, see pages 37-40.

Multiple discrimination

The member may be subjected to more than one type of discrimination.

For example: An Egyptian catering worker is told he has not been promoted because he does not have formal catering qualifications. A white British worker without such qualifications is in fact promoted. When the Egyptian worker complains, he gets dismissed. This may be:

- *Direct race discrimination (a comparable white worker was promoted) and/or*
- *Indirect race discrimination (an unjustifiable requirement of formal qualifications was imposed) and/or*
- *Victimisation (dismissal for raising the complaint). If this worker is female, she may have suffered both race and sex discrimination.*

It weakens the member's chances of proving a case if s/he makes too many allegations of discrimination or involves too many protected characteristics. It is usually best to stay focussed on the strongest points.

When may discrimination occur?

Unlike the law on unfair dismissal, the EqA does not only cover dismissal situations. It forbids discrimination in a whole range of situations at work. Section 39 sets these out in detail. In summary, an employer or potential employer must not discriminate against a worker:

- When choosing whether to employ him/her.
- When choosing whether to promote him/her.
- In the terms and conditions offered to a worker.
- In offering training opportunities.
- In access to benefits and services generally.
- When dismissing him/her.
- By subjecting him/her to 'any other detriment', eg disciplinary action.

Because discrimination (whether direct, indirect or victimisation) can occur at so many points, you need to be constantly alert to the possibility.

Indirect discrimination may be particularly hard to detect. You need to consider what hidden rules and conditions may determine:

- Access to particular jobs – who is short-listed, who is appointed.
- Access to promotion – who is short-listed, who is promoted.

- Access to acting-up opportunities.
- Access to overtime opportunities.
- Access to training opportunities.
- Access to opportunities to earn additional bonuses and benefits.
- Access to subsidised mortgages.
- Access to occupational pension schemes.
- When and for how long holidays can be taken.
- Who gets selected for redundancy.
- Access to voluntary enhanced redundancy packages.
- Eligibility to formal disciplinary/grievance procedures.
- Grading levels.

For example:

- *Promotion may depend on a worker's previous acting-up experience. In the particular workplace, past acting-up opportunities may have been given mainly to white workers.*
- *Temporary staff may not be covered by formal procedures if they have a grievance, or if a disciplinary issue comes up. In many workplaces, it is black workers and women who hold the temporary positions and would be the worst affected. (See pages 15-16 and 19-20 for further examples.)*
- *Voluntary redundancy packages may not be available to staff on a career break. It is far more likely that women will be on a career break than men.*

The burden of proof

In a tribunal case, does the member have to prove discrimination happened? Or does the employer have to disprove it if the member makes an accusation? This is called the 'burden of proof'.

The answer is half and half. The member has to prove enough facts to suggest there is a case to answer. The legal test is whether the member can prove facts from which the tribunal could find unlawful discrimination if there was no explanation from the employer. If so, the burden of proof 'shifts' to the employer, who must give an explanation and prove that they did not discriminate in any way.

Vicarious liability

As a general rule, the employing organisation is automatically responsible for any discrimination by one worker or manager against another in the course of employment. This concept is called 'vicarious liability'. It applies even if the top people in the organisation did not know what their junior managers were doing.

The organisation cannot escape responsibility by dealing promptly with the discrimination once it finds out, eg in a harassment case, by sacking the perpetrator. The organisation will still be responsible for the harassment that has already happened – although it will avoid incurring additional liability for mishandling the issue once it comes to light.

Employers often do not realise that they can be held legally responsible for discrimination carried out by one manager or employee against another, even if they did not know about such discrimination and did not approve of it. This is a powerful incentive for employers to take effective preventative action.

The organisation's only defence will be if it has taken all reasonable steps to prevent such discrimination ever occurring. In practice, employers can rarely use this defence. It means they must operate an equal opportunities policy very actively indeed.

The European Code on Sexual Harassment is a useful reference point for assessing steps taken by the employer in cases of sexual harassment, as it sets out detailed recommendations both on prevention and on handling a grievance.

What kind of preventative steps would be sufficient?

There are no rigid guidelines, but a tribunal is likely to expect the employer to have a detailed written Equal Opportunities or Harassment policy, which is properly implemented. Paper policies alone are not enough.

As an example, in one racial harassment case, the tribunal were impressed by the following aspects of the policy:

- The policy gave detailed guidance both to managers and to employees.
- Harassment was broadly defined and included non-verbal actions such as comments, 'jokes' and banter.
- The policy stated that, where appropriate, the alleged harasser would be transferred to work in another area while any complaint against him/her was investigated.
- The emphasis was on moving the harasser, not the person harassed.
- Notices about harassment were posted.
- A questionnaire was sent out to the workforce asking if workers had been harassed. Of the 16 workers who said yes, the employers investigated every single case.
- Employees were trained in equal opportunities.

The tribunal stated:

'We are satisfied that the policy is not only detailed, careful, reasonable and in our view, exemplary, but was acted upon. Harassment is a live issue, not a dead letter. There is a tight code of conduct.'

This case demonstrates how a high level of preventative action is required if the employer wants to use the defence.

2 Direct and indirect discrimination at work

What is direct race discrimination?

Direct discrimination is the most obvious form of discrimination. The formal definition in section 13 of the EqA states:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat other persons.

Applying this to 'race' and using less legalistic language, the definition amounts to this:

An employer discriminates against the member if s/he treats the member less favourably because of the member's race than s/he treats or would treat someone of a different race.

The 'but for' test is often a very good way to understand and identify direct race discrimination. Always ask yourself whether the employer treated the member differently because of his/her race, eg 'but for' the fact that the member was black, would the employer have promoted him/her?

As explained on page 7 above, it is also unlawful to treat a person less favourably due to someone else's race or because s/he is wrongly perceived to be of a certain race.

The employer's motives

The employer's motives are irrelevant. What matters is what the employer does. An employer may not be personally prejudiced and may even act with good intentions, but if s/he treats a black worker differently from how s/he would treat a white worker in the same circumstances, s/he has directly discriminated.

Examples of different motives which are all unlawful:

- **Loss of business:** an employer decides not to put a black worker in a customer-facing role due to fear of customer disapproval or other outside pressure.
- **Reaction of existing workforce:** an employer refuses to

recruit a black worker due to fear of industrial unrest, or that a worker will not 'fit in', or that white workers will not take orders from a black supervisor.

- **Politics or populism:** a local authority decides to reduce the number of black managers it employs for political reasons or to appease the populist media pressure.
- **Patronising:** an employer treats a black worker differently, even if for benevolent motives, eg not employing black bar-staff in a National Front area.
- **Stereotyping:** an employer refuses a job to an Irish worker who has just arrived in England because s/he thinks Irish workers get homesick quickly and return to Ireland after a short time.
- **Unconscious discrimination:** an employer in fact treats a black worker less favourably, but without realising it.

Unconscious discrimination

Obviously it is easier to prove discrimination where the employer displays racial prejudice, rather than proving that unconscious attitudes or stereotyping have operated. However, it is important to remember that a manager may have discriminated even if s/he is unaware of it and appears genuinely well-intended. Evidence is always necessary and it is most revealing to look at what the manager has actually done in practice. In an important case, the House of Lords recognised that racial discrimination can be unconscious:

'All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of the claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that whether the employer realised it at the time or not, race was the reason why he acted as he did Members of racial groups need protection from conduct driven by unconscious prejudice as much as from conscious and deliberate discrimination.'

**Nagarajan v London Regional Transport
(1999 IRLR 572)**

Defences to direct race discrimination

There is no defence. Less favourable treatment because of race, whatever the motive, is inexcusable. However, there are some limited exceptions for occupational requirements (ORs) and positive action (see page 25).

Proving direct race discrimination

Evidence checklist: direct race discrimination

It is necessary to look for evidence of 'different' treatment as opposed to simply 'unfair' treatment. The most helpful evidence, though not essential, is:

- **A comparator** – evidence to show a comparable work colleague of a different 'race' has been treated more favourably in similar circumstances.
- There is **no convincing neutral non-discriminatory explanation** as to why the comparator has been treated more favourably. (The explanation need not be fair, but it must be believable.)
- It is not necessary to have an actual comparator to prove direct discrimination, but it helps. Otherwise it is easy for employers to argue that they would have treated anyone else unfairly too.
- **Racist comments** made by the relevant decision-makers. These are helpful evidence, but can be hard to prove.

Employers may say:

- They may have been unfair, but they would have been **unfair to anyone**.
- They are just **incompetent**. What they have done is nothing to do with discrimination. (Tribunals are very cautious about accepting this defence because it is very easy to argue. However, in some cases, the employer can prove it is true.)
- There are no comparators. They treat other workers who are white the same way.
- If they have treated a white worker better, that is because the circumstances were different and it is not a good comparison.
- It helps to know what kind of defence the employer might put forward, so you can think about how to find evidence to disprove it.

An example of a successful direct race discrimination case

Valdez v L B Camden [2012]

Mr Valdez is of mixed race. On a reorganisation in 2011, staff had to apply for new positions. Mr Valdez was appointed to the role of Environmental Management Officer, but failed in his application for one of several Senior Environmental Manager Officer ('SEMO') vacancies. At the end of the interview process, he scored 17. A white candidate, Mr Gray, had scored 16, but following a moderation meeting by the panel, his score was increased to 18.

The employment tribunal found direct race discrimination against Mr Valdez for the following reasons: no satisfactory account was given for the alteration of Mr Gray's score; the successful candidates for the SEMO post were all white; the decision makers were all white; the upper levels of management were almost all white; there was a remarkable racial divide between the North and South Teams in the Street Environment Service; the Council repeatedly failed to document crucial decisions in relation to the reorganisation; and the Council had failed to answer Mr Valdez's EqA questionnaire.

Comment: the crucial evidence of direct discrimination was:

- *A comparator treated better in similar circumstances.*
- *No convincing non-discriminatory explanation for the better treatment of the comparator.*
- *Key decisions not documented.*
- *The ethnic profile of decision-makers, senior managers and successful candidates.*

An example of a failed direct race discrimination case

Ayodele v (1) Citylink Ltd (2) Napier [2017]

Mr Ayodele worked for Citylink as a warehouse operative in its distribution depot in Swansea. He is black and of Nigerian origin. Mr Napier was his team manager. Mr Ayodele brought a tribunal claim for various acts of race discrimination leading up to his resignation.

Mr Ayodele lost his case. He did not even shift the burden of proof. The tribunal said there was very poor management at junior and mid-managerial levels and a culture where mistakes made in managing payroll, holidays and staff were tolerated. This was not a matter of Mr Ayodele being treated differently. With regard to Mr Ayodele's particular complaints:

- 1 Mr Ayodele said Mr Napier refused to call him by name, would beckon him over and did not speak politely to him. The tribunal said other employees would also have been beckoned in this way on occasion because of the noisy environment.

Comment: It will not be direct race discrimination if there is evidence that the employer treats white employees in the same way.

- 2 Mr Ayodele complained that on various occasions Mr Napier was angry with him about his sickness absences and insisted that Mr Ayodele attend work even when he was ill. The tribunal said that Mr Ayodele had an exceptionally poor attendance rate. Mr Napier did express some frustration because of this and also because of Mr Napier's poor management skills. The tribunal said that 'If a non-black employee, with similar service and in a similar role had a similar level of absenteeism to Mr Ayodele, the manner in which Mr Napier would have dealt with that comparator would be no different to the way in which he dealt with Mr Ayodele.'

Comment: It will not be direct race discrimination if there are obviously non race-related reasons why the member might have been treated unfavourably. It is worth discussing with the member whether there is any evidence to suggest a white person in the same situation would have been treated any differently in identical circumstances.

- 3 Mr Ayodele complained that there were significant difficulties with his pay at times when he applied for annual leave. However, this was because of training issues on the holiday and payroll system. Many other people also had difficulties.

- 4 Mr Ayodele complained that, when he submitted his requests for annual leave Mr Napier would ignore those requests. The tribunal said Mr Ayodele had not proved Mr Napier did this.

Comment: It will not be direct race discrimination if the member cannot prove the mistreatment happened.

- 5 Mr Ayodele complained that he was removed from working on the customer service desk whenever Mr Napier found him working there. The tribunal said the reason for moving Mr Ayodele was based on the need for specific tasks to be undertaken. A non-black person with Mr Ayodele's skills working on the desk would also have been moved to a new task in the same way.
- 6 Mr Ayodele complained that he received no training to become a forklift operator. However, it was not Mr Napier who made the decision as to who should be trained; that was a decision made by a Mr Parsons and there had been no complaint made by Mr Ayodele about his treatment at the hands of Mr Parsons.

Comment: It is important always to find out who has done the discriminatory actions. The evidence then needs to suggest that this particular individual is likely to discriminate. If all of the member's complaints are against one manager, and there is a single incident involving an entirely separate manager, there needs to be some convincing evidence why that other manager has also been discriminatory.

What is direct sex discrimination?

Direct discrimination is the most obvious form of discrimination. The formal definition under section 13 is set out above under the section on direct race discrimination.

Applying this to 'sex' and using less legalistic language, the definition amounts to this:

An employer discriminates against the member if s/he treats the member less favourably because she is a woman than s/he treats or would treat a man.

Direct discrimination can also be because the member is a man or because s/he is married or a civil partner or undergoing gender reassignment.

The 'but for' test is often a very good way to understand and identify direct sex discrimination. Always ask yourself whether the employer treated the member differently because of his/her sex, eg 'but for' the fact that the member was a woman, would the employer have promoted her?

As explained on page 7 above, it is also unlawful to treat a person less favourably due to someone else's sex etc or because s/he is wrongly perceived to be of a certain sex.

The employer's motives

As with direct race discrimination, an employer's motives are irrelevant. What matters is what the employer does. An employer may not be personally prejudiced and may even act with good intentions, but if s/he treats a female or married worker differently from how s/he treats or would treat a male or unmarried worker in the same circumstances, s/he has directly discriminated.

Examples of different motives which are all unlawful:

- **Loss of business:** an employer decides not to place a woman on a front desk on the assumption that customers or clients will prefer to deal with a man.
- **Reaction of existing workforce:** an employer refuses to appoint or promote a woman because she will not 'fit in' or because male workers will not accept a female supervisor.
- **Patronising:** a taxi service refuses to employ women on night shifts for fear of them being attacked and the employer's cars being damaged.
- **Stereotyping and the idea that there are women's jobs and men's jobs:** an employer refuses to employ a woman for a warehouse job, because it is assumed that she cannot lift heavy loads.
- **Assumptions about childcare:** an employer decides not to promote a woman because the employer just assumes that she will be unable to travel or work extra hours or that she will be absent a lot due to childcare.
- **Unconscious discrimination:** an employer in fact treats a female worker less favourably, but without realising it.

Obviously it is easier to prove discrimination where the employer displays overtly sexist attitudes, rather

than to prove that unconscious attitudes or stereotyping operated. Where unconscious attitudes may be a factor, note the comments of the House of Lords regarding race discrimination on page 10.

Pregnancy discrimination is dealt with on page 40, discrimination in relation to gender reassignment on page 48 and sexual harassment on pages 37-40.

Defences to direct sex discrimination

Again, as with cases of race discrimination, there is no defence. Less favourable treatment because of sex, whatever the motive, is inexcusable. However, there are some limited exceptions for occupational requirements and positive action (see page 25).

Proving direct sex discrimination

Evidence checklist: direct sex discrimination

It is necessary to look for evidence of 'different' treatment as opposed to simply 'unfair' treatment. The most helpful evidence, though not essential, is:

- **A comparator** – evidence to show a comparable work colleague of a different sex has been treated more favourably in similar circumstances.
- There is **no convincing neutral non-discriminatory explanation** as to why the comparator has been treated more favourably. (The explanation need not be fair, but it must be believable.)
- It is not necessary to have an actual comparator to prove direct discrimination, but it helps. Otherwise it is easy for employers to argue that they would have treated anyone else unfairly too.
- **Sexist comments** made by the relevant decision-makers. These can be hard to prove.

Employers may say:

- They may have been unfair, but they would have been **unfair to anyone**.
- They are just **incompetent**. What they have done is nothing to do with discrimination. (Tribunals are very cautious about accepting this defence because it is very easy to argue. However, in some cases, the employer can prove it is true.)
- There are **no comparators**. They treat male workers the same way.
- If they have treated a man better, that is because his **circumstances were different** and it is not a good comparison.

An example of direct sex discrimination

Megahey v Action Cancer (2008)

Ms Megahey worked as a retail support officer. On a reorganisation, her role and that of her immediate manager were amalgamated into a new post of retail manager. A number of employees applied including Ms Megahey and Mr Lynch (manager of one of the shops which Ms Megahey had been responsible for supervising). Ms Megahey, Mr Lynch and six others were interviewed by a three- person panel. Ms Megahey got the highest marks (292 points), while Mr Lynch and a Ms Sloan came joint second with 285 points. The panel decided to invite all three candidates back for a second interview, although there had been no previous indication this might happen. The evening after the 1st interview, one of the panel members telephoned Ms Sloan at home and asked whether he could contact her employer with regard to a question she had asked at interview about salary. Ms Sloan strongly objected to him contacting her employer before she had been offered the post and later that evening she withdrew her application. The second interview panel was the same as the first plus the incoming head of fundraising who was to line manage the new post. Mr Lynch scored 98 and was appointed. Ms Megahey scored 97.

A Northern Ireland tribunal found sex discrimination against Ms Megahey for these reasons: She had scored 7 points more than Mr Lynch first time round. There was so little information on Mr Lynch's application form that the tribunal could not see how he had made it through to the interview stage. There was no woman on the short-listing panel and there were few notes of the short-listing or post-interview discussions. On balance, the tribunal also thought the panel member's purpose in contacting Ms Sloan had been to discourage a strong female candidate from continuing with her application.

Comment – the crucial evidence of direct discrimination was:

- *A comparator treated better in similar circumstances.*
- *No convincing non-discriminatory explanation for the better treatment of the comparator.*
- *Another person of the same sex also treated badly in similar circumstances.*
- *Key decisions not documented.*
- *The gender profile of decision-makers and other candidates.*

What is indirect race discrimination?

The stages in the definition

Direct discrimination means treating workers differently according to their race. Indirect discrimination occurs where the employer treats – or would treat - all workers the same way, whatever their race, but the result of the treatment is that workers of a particular racial group are disadvantaged.

Indirect discrimination only applies to the application of provisions, criteria or practices which have an adverse impact disproportionately on certain racial groups.

For example, a requirement that all job applicants speak fluent English, while applied to everyone, would disproportionately debar from employment people born and brought up in non-English speaking countries.

The definition of indirect discrimination contained in section 19 of the EqA is notoriously hard to understand and apply. It is as follows:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Applying this to race discrimination, it is indirect race discrimination if the employer applies to the member a provision, criterion or practice which

- puts or would put other people of the same 'race' as the member at a particular disadvantage compared with those of a different 'race'
- puts or would put the member at that disadvantage
- and which the employer cannot show to be a proportionate means of achieving a legitimate aim.

To understand this wording, it is easier to ask the following questions in order:

- Was the member selected for redundancy or prevented from getting promotion etc because of a certain provision, criterion or practice?
- Was the provision, criterion or practice one which put people from the same racial group as the member at a particular disadvantage?
- Can the employer prove the application of the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

The following pages explain in more detail:

- What kinds of provision, criterion or practice may occur, and when.
- Whether a provision, criterion or practice puts the member at a particular disadvantage.
- Whether the member's racial group is generally disadvantaged by such a provision, criterion or practice.
- What kind of justification from the employer tribunals will accept.

Indirect race discrimination: provisions, criteria or practices

In everyday working patterns and policies, there are countless hidden provisions, criteria or practices which certain groups of workers find hard or impossible to meet. For example, a requirement that job applicants hold British qualifications would disadvantage candidates of non-British nationality or national origin. These requirements often create unnecessary barriers to true equal opportunities for getting jobs, promotion and improvement in pay and conditions.

Some provisions, criteria or practices ('PCPs') with adverse effects are unavoidable and it is not unlawful for employers to impose PCPs which they can objectively justify. However, many PCPs cannot be justified once challenged. Requiring a higher level of language fluency than necessary for the job would be unjustifiable, for example. (Page 17 gives further examples of what may justify otherwise discriminatory PCPs.)

Discriminatory PCPs are often hidden and members may not themselves notice them. When a black or minority ethnic member brings a grievance to you, you need to investigate whether any hidden discriminatory practices or requirements have caused the problem. More generally, employers' systems and policies, existing and new, need to be carefully examined for their effects. (See Employers' policies section on page 53.)

As set out in the checklist on page 8, discriminatory practices may occur in a whole range of working situations. Below is a list of PCPs which, unless an employer can objectively justify them, often have a discriminatory effect on black or foreign-born workers. (Many such PCPs also affect other disadvantaged groups and particularly women.)

Part 2 of this guide gives examples of PCPs to be wary of in particular situations, ie recruitment, promotion, redundancy selection.

Checklist of possibly discriminatory provisions, criteria or practices: race

Check to see whether any of the following provisions, criteria or practices apply in your workplace. They may well have a discriminatory effect on black or minority ethnic workers.

Qualifications

- formal qualifications
- qualifications only obtainable in the UK
- university degree
- qualifications from certain universities/organisations/Oxbridge
- English language qualifications

Language / expression / culture / confidence

- English language fluency – written/verbal
- communication skills
- writing skills
- essay-based tests and application forms
- psychometric testing
- culturally-biased testing
- articulacy/fluency in interview performance
- acquiring new technical skills/knowledge, within short time periods/without special training (difficult in an unfamiliar language/with foreign technology)

Experience / service / paid employment

- previous kinds of work experience
- previous management experience
- already being at a certain grade/holding a certain high-level job
- previous (fast) promotions
- previous width/variety of experience
- length of previous experience or service in certain

positions/with the employer/in the industry/with past employer

- previous paid employment/paid relevant experience
- previous steady employment/no periods of unemployment
- having attended refresher/training courses (usually unavailable to night staff who tend to be black/women)
- previous acting-up experience
- being on a permanent rather than temporary contract

Dress

- uniform/dress/no turbans
- clean-shaven (eg affects Sikhs)

Attendance / shifts

- days/hours of work/shifts/flexibility (Sabbaths/religious holidays)
- not taking holiday entitlement at one time (visits to family abroad)
- limited unpaid/compassionate leave (need to visit ill family abroad)
- good attendance record (extended holidays/unpaid leave to visit family abroad)
- late travel home (danger of racial attacks)

Keeping it internal / references in and out / being part of the club

- nomination/recommendation by/reference from particular staff/management for recruitment/promotion
- word of mouth recruitment (knowing existing workers)
- favouring children from existing staff
- jobs/vacancy lists only on enquiry
- internal applications only
- customer satisfaction (liability to racist complaints)
- membership of certain organisations, professional bodies or trade unions/certain (culturally specific) leisure activities or interests

Is the member at a disadvantage?

The member must prove that s/he would be or has been put at a disadvantage due to the discriminatory provision, criterion or practice.

It is sufficient if the provision, criterion or practice is to the member's detriment at the time it is applied.

For example: There is a requirement that job applicants have lived in a certain Borough for three

years or that they possess an English language GCSE. It is irrelevant that the member is capable of acquiring the GCSE in the near future or that she could easily move to the Borough and live there. She could not meet the criterion at the time it mattered (ie to get the job).

The most obvious example of indirect discrimination is where a worker physically cannot meet the requirement.

For example: A requirement that workers be over 6' tall would disadvantage people from some countries.

However, it is also unlawful if the member cannot meet a requirement because of his/her cultural and community obligations.

For example: A requirement to be clean-shaven or to wear a short-skirted uniform. In theory Sikhs could shave their beards and Pakistani women of the Muslim religion could wear the uniform, but in practical terms they could not do so. This could also be indirect religious discrimination.

A worker who simply prefers not to meet the PCP, but is not at a disadvantage in the senses set out above, cannot claim indirect discrimination.

For example: A man wishes to have a beard because he thinks it suits him, but not for any cultural/religious reason.

Would others of the same racial group also be put at a particular disadvantage by the provision, criterion or practice?

It is not sufficient that the member is disadvantaged by the provision, criterion or practice ('PCP'). It needs to be shown that other workers of the same racial group would have the same difficulty.

It is unnecessary to show the PCP has in fact been applied to other workers of the same racial group. It is enough to show it is the sort of PCP which if applied would have adverse impact on that racial group.

The requirement need not disadvantage all members of the relevant racial group. You need only show that it would put some workers of the relevant group at a disadvantage compared with others.

For example: A requirement that workers hold British qualifications would not exclude all workers of non-British nationality, but would bar more of them than workers of British nationality.

A requirement that employees work on Saturdays would not cause difficulties for all Jewish workers, because many of them would not feel they should not work for religious reasons. But it is enough that some Jewish workers feel they should not work on the Sabbath.

Justification: Is the provision, criterion or practice a proportionate means of achieving a legitimate aim?

Many provisions, criteria or practices are imposed in everyday working life which adversely affect minority ethnic workers. However, in many cases, these practices are necessary and cannot be challenged. If an employer can prove that it was justifiable to adopt the practice or impose the criterion, then it will not be unlawful. To justify the provision, criterion or practice, the employer must show it is a proportionate means of achieving a legitimate aim.

It is not enough for employers to say that they considered their reasons to be adequate for adopting the practice or imposing the provision or criterion. The provision, criterion or practice must be objectively justifiable regardless of race, not simply justifiable in the personal opinion of the particular employer.

Employers must prove

- 1 That they are trying to achieve an aim which is legitimate.
- 2 That using the provision, criterion or practice is a proportionate means of achieving that aim.

Legitimate aims could be:

- Administrative efficiency.
- Health and safety
- Maintaining continuous service provision.

Whether an employer can justify applying the provision, criterion or practice depends on the facts and circumstances of the particular case.

The greater the adverse effect of the particular PCP on the individual concerned and on people from his/her racial group generally, the better justification the employer must provide.

Discriminatory provisions, criteria or practices, where unavoidable, should be kept to the minimum necessary for the employer's needs. Where there is a fairer way of achieving the same end, the requirement is unlikely to be justifiable.

For example: A requirement that workers in a large kitchen be clean-shaven for hygiene reasons is unlikely to be justifiable, because protective clothing could be worn.

A requirement that a worker from abroad with English as a second language should acquire considerable technical information and skills within a short time may not be justifiable if more time and training could be offered.

A criterion that only deputy head teachers can apply for head teacher posts is probably not justifiable, since there are other ways of measuring potential.

In one case, a tribunal said that a requirement that a charge nurse applying for a nurse manager job should have a record of rapid career progression in the past was not justifiable. There are other ways of measuring management potential and it is known that black nurses have not progressed in the NHS due to past discrimination.

What is indirect sex discrimination?

The stages in the definition

Direct discrimination means treating workers differently according to their sex. Indirect discrimination occurs where the employer treats – or would treat – everyone the same way, but the result of the treatment is that women (or men) are particularly disadvantaged.

For example, a requirement that all employees work full-time would have adverse impact on women because they are more likely to have childcare commitments.

The definition of indirect discrimination contained in section 19 of the EqA is notoriously hard to understand and apply. It is as follows:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Applying this to sex discrimination, it is sex discrimination if the employer applies to a female member a provision, criterion or practice which

- puts or would put other women at a particular disadvantage compared with men
- puts or would put the member at that disadvantage
- and which the employer cannot show to be a proportionate means of achieving a legitimate aim.

To understand this wording, it is easier to ask the following questions in order:

- Was the member selected for redundancy or prevented from getting promotion etc because of her inability to meet a certain provision or criterion or because of a practice adopted by her employer? Was the provision, criterion or practice one which would put women at a particular disadvantage compared with men?
- Can the employer show that applying the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

Indirect sex discrimination also applies to men or being married or being a civil partner or in connection with gender reassignment.

The following pages explain in more detail:

- What kinds of provision, criterion or practice may occur and when.
- Whether the provision, criterion or practice puts the member at a particular disadvantage.
- Whether the member's gender group is generally disadvantaged by such a criterion, provision or practice.
- What kind of justification from the employer the tribunals will accept.

Indirect sex discrimination: provisions, criteria and practices

As with race discrimination, in everyday working life, there are countless practices which disadvantage certain groups of workers. These practices often create unnecessary barriers to true equal opportunities for getting jobs, promotion and improvement in pay and conditions.

Some practices with adverse effects are unavoidable and it is not unlawful for employers to act in a way which they can objectively justify. However, many practices cannot be justified once challenged. For example, requiring a secretary in a typing pool to work full-time when two part-timers could do the job just as easily. (Page 20 gives further examples of what may justify otherwise discriminatory practices.)

Discriminatory practices are often hidden and members may not themselves notice them. When a woman brings a grievance to you, you need to investigate whether any hidden discriminatory requirement or practice has caused the problem. More generally, employers' systems and policies, existing and new, need to be carefully examined for their effects. (See page 53 on Employers' policies.)

As set out in the checklist on page 8, discriminatory practices may occur in a whole range of working situations. Below is a list of PCPs which, unless justifiable, often have a discriminatory effect on women. (Many such requirements also affect other disadvantaged groups and particularly black and other minority ethnic workers.)

Part 2 of this guide gives examples of PCPs to be wary of in particular situations, ie recruitment, promotion, redundancy selection.

Checklist of possibly discriminatory criteria and provisions: sex

Check to see whether any of the following requirements, criteria and provisions apply to your workplace. They may well have a discriminatory effect on women workers.

Qualifications

- certain types of formal qualifications
- university degree in certain subjects
- qualifications from certain universities/organisations/Oxbridge

Experience / service / paid employment

- previous kinds of work experience
- previous management experience
- already being at a certain grade/holding a certain high-level job
- previous (fast) promotions
- previous width/variety of experience
- acquiring certain types of technical skill/knowledge, within short time periods/without special training
- length of previous experience or service in certain positions/with the employer / in the industry/with past employer
- previous length of continuous experience/experience by a certain age (disadvantages women due to career breaks)
- previous paid employment/paid relevant experience
- previous steady employment/no periods of unemployment
- having attended refresher/training courses (usually unavailable to night staff who tend to be black/women)
- previous experience of 'acting' or 'substitution' (opportunities may have gone to men)
- being employed permanently rather than on a temporary or fixed term contract

Miscellaneous

- age bars (women may be out of the job market during child-bearing age)
- to have acquired a certain level of experience by a certain age
- certain forms of dress or uniform (eg may indirectly discriminate against Muslim women)
- late finishing hours (possibly dangerous travel home)

- home visits, eg to patients or tenants unaccompanied (in some circumstances may be dangerous)

Note: Employers should provide a safe system of work for all workers, but should not directly discriminate against women unless allowed by statute (eg in certain circumstances in relation to pregnancy and childbirth).

Attendance / shifts / flexibility / mobility

(Requirements likely to cause difficulty for women – and sometimes for married men – usually due to childcare commitments.)

- full-time work (refusal to allow job-share or part-time working)
- permitting part-time working, but requiring some hours to be worked each day
- overtime or week-end working
- shift-working, especially rotating shifts varying from day to day or week to week
- requirements to work overtime or varying shifts imposed at very short notice
- specified and inflexible start or finish times (interfering with times of taking or collecting children from school or child-minding)
- all year round working (eg as opposed to term-time only)
- requirements entailing certain (high) attendance levels / limited absences
- open hours contracts (no fixed working hours)

Mobility

- long journeys to and from work locations (necessitating earlier departures from and returns to home)
- work trips necessitating staying overnight away from home
- relocation (may be unacceptable if woman is not the primary earner in the household)

Note: Flexibility and mobility requirements often do cause women difficulties and should therefore be justified by the employer. However, it would be direct discrimination if an employer wrongly assumed a woman would be less flexible and treated her less favourably for that reason.

Keeping it internal / references in and out / being part of the club

(Requirements reinforcing discrimination where existing workforce is primarily of one sex)

- nomination/recommendation by/reference from particular staff/management for recruitment/promotion
- word of mouth recruitment (knowing existing workers)
- favouring children from existing staff (if existing staff are all of one sex)
- jobs/vacancy lists only on enquiry
- internal applications only
- membership of certain organisations, professional bodies or trade unions/certain (gender specific) leisure activities or interests

Is the member at a disadvantage?

The member must prove that she would be or has been put at a disadvantage due to the discriminatory provision, criterion or practice.

It is sufficient if the PCP is to the member's detriment at the time it is applied.

For example: An employer who selects part-timers first for redundancy indirectly discriminates against women who are then working part-time. It is irrelevant if a woman works part-time for historical reasons and her children are now grown-up, because she is not given the option of working full-time when the selection criterion applies.

The most obvious example of indirect discrimination is where a worker physically cannot meet an employer's job criteria.

For example: A woman is not recruited because she is only 5 feet 6 inches tall. The employer requires workers to be 6 feet tall.

However, if a woman is disadvantaged because of childcare obligations, this is usually also considered unlawful.

For example: A woman is dismissed because she is unable to work a flexible rota as she has young children to look after. Most tribunals accept that there are two conflicting but equally valid messages directed towards women in today's society – one of which says she

should remain at home and look after her children. (The other encourages her to go out to work.) Some tribunals take a more literal approach, however, and insist that a woman proves that alternative childcare arrangements are practically or financially impossible.

Obviously, a worker who simply prefers not to work full-time, but is not at a disadvantage in the senses set out above, cannot claim indirect discrimination.

For example: A woman may wish to work part-time because she wants to spend the rest of her time gardening.

Would the provision, criterion or practice put other women at a particular disadvantage too?

It is not sufficient that a particular woman is disadvantaged. It is necessary to show that many other women would have the same difficulty. However, it is unnecessary to show that all women would be disadvantaged by the PCP.

For example: A full-time work requirement would debar proportionately more women than men, although many women would not find this a problem.

Justification: Is the provision, criterion or practice a proportionate means of achieving a legitimate aim?

Many criteria and practices exist in everyday working life which adversely affect women. However, in many cases, these practices are necessary and cannot be challenged. If an employer can prove that it was justifiable to adopt the practice or impose the criterion, then it will not be unlawful. To justify the provision, criterion or practice, the employer must show it is a proportionate means of achieving a legitimate aim.

It is not enough for employers to say that they considered their reasons to be adequate for adopting the practice or imposing the provision or criterion. The PCP must be objectively justifiable regardless of sex, not simply justifiable in the personal opinion of the particular employer.

Employers must prove:

- 1 That they are trying to achieve an aim which is legitimate.
- 2 That using the provision, criterion or practice is a proportionate means of achieving that aim.

Legitimate aims could be:

- Administrative efficiency.

- Health and safety.
- Maintaining continuous service provision.

Whether an employer can justify applying the provision, criterion or practice depends on the facts and circumstances of the particular case. The greater the adverse effect of the particular requirement on the individual concerned and on women generally, the better justification the employer must provide.

For example: Employers constantly insist on full-time working and shift-working. Whether this is justifiable varies very much from case to case looking at the practicalities of the situation.

Discriminatory PCPs, where unavoidable, should be kept to the minimum necessary for the employer's needs. Where there is a fairer way of achieving the same end, the PCP is unlikely to be justifiable.

For example: Insisting that only deputy head teachers can apply for head teacher posts may not be justifiable, since there are other ways of measuring potential.

A requirement that a woman work rotating shifts was not justifiable in one case because the employer had a sufficiently large workforce to be able to accommodate her needs.

In another case, it was not found justifiable to insist that a female receptionist work full-time because it was perfectly feasible to arrange for a job-share.

An example of indirect sex discrimination

Thomas v The Arts Council of Wales (2009)

Ms Thomas was an Arts Development Officer. She asked to work part-time on her return from maternity leave, working either 5 days / fortnight or 2½ days / week. Her employer refused, saying it would have a detrimental effect on client service, in particular because it was necessary to have five-day cover in case clients had emergencies. The employer also argued it would be difficult to recruit a part-time worker for the other 2 or 3 days/week.

The tribunal said the full-time work requirement was not justified. The employer had very significantly overstated the need for a 5-day service by Arts Development Officers to cover potential emergencies. Moreover, even if 5-day cover was provided, there would

still be week-ends when Arts organisations might be operating but there would be no cover anyway. Any delay resulting from Ms Thomas only working part-time would be no greater than delays caused when emergencies happened at week-ends. As for the argument that the employer could not recruit another part-timer, the employer had not even tested this by trying to recruit or making enquiries about the availability of such staff.

3 Victimisation

What is meant by victimisation (race)?

Under section 27 of the EqA, victimisation is made unlawful. 'Victimisation' has a very specific meaning under the EqA. It does not simply mean picking on the member. It means treating the member unfavourably because s/he has complained about discrimination.

Under victimisation law, an employer must not subject the member to a detriment because s/he has complained of discrimination or given evidence supporting another worker or done any other 'protected act'.

The member is protected if s/he makes an allegation of anything which would be unlawful race discrimination – s/he need not actually use the words 'race discrimination' or refer to the EqA. However, the employer must clearly understand that s/he is referring to race discrimination.

For example:

- *A worker is sacked because she brought a grievance complaining about race discrimination in a recent failed promotion attempt.*
- *A worker is transferred because he had complained that work colleagues were making racist remarks.*

In addition, it is victimisation to subject the member to a detriment because s/he has made a relevant pay disclosure or tried to obtain information from such a disclosure. A 'relevant pay disclosure' is one which is made in order to find out if there is any connection between pay and race (or other protected characteristic).

It is also unlawful if the employer penalises the member simply because s/he suspects that the member has alleged race discrimination or that s/he intends to do so. However, this is harder to prove.

The employer has a defence only if the member made a false allegation in bad faith.

For example: A worker who is disciplined for making an allegation of race discrimination which is found to be wrong must not be victimised as long as she genuinely believed the allegation was true when she made it.

Points to note:

- *Be careful because potential victimisation claims are frequently missed. Be alert to any change in the employer's attitude or behaviour towards the worker after the allegation is made.*

- *Where an allegation of race discrimination is made, it should be explicit, unambiguous and in writing, so that the making of the allegation can be proved.*

Victimisation is an industrial relations issue as well as a legal issue. Many employers with policies against direct and indirect discrimination have not thought about how to avoid victimising a worker who makes an allegation of racism.

An employment tribunal in Birmingham has commented:

'Perhaps the question of victimisation has not been sufficiently publicised and yet it is a very important part of the Act. Indeed, a very important part of race relations philosophy, and as a matter of public policy employers should be made more aware of their responsibilities in this connection.'

See page 24 for further examples and a checklist on victimisation.

What is meant by victimisation (sex)?

Under section 27 of the EqA, victimisation is made unlawful. 'Victimisation' has a very specific meaning under the EqA. It does not simply mean picking on the member. It means treating the member unfavourably because s/he has complained about discrimination.

Under victimisation law, an employer must not subject the member to a detriment because s/he has complained of discrimination or given evidence supporting another worker or done any other 'protected act'.

The member is protected if s/he makes an allegation of anything which would be unlawful sex discrimination – s/he need not actually use the words 'sex discrimination' or refer to the EqA. However, the employer must clearly understand that s/he is referring to sex discrimination and penalise him/her for that reason.

For example:

- *A worker is sacked because she brought a grievance complaining about sex discrimination in a recent failed promotion attempt.*
- *A worker is transferred because she had complained that a colleague was being given better work because he was a man.*

In addition, it is victimisation to subject the member to a detriment because s/he has made a relevant pay disclosure or tried to obtain information from such a disclosure. A 'relevant pay disclosure' is one which is made in order to find out if there is any connection between pay and gender (or other protected characteristic).

It is also unlawful if the employer penalises the member simply because s/he suspects that the member has alleged sex discrimination or that s/he intends to do so. However, this is harder to prove.

For example:

An employer finds in a worker's desk her private diary noting down incidents of pregnancy discrimination and issues her with a warning for leaving defamatory notes in a public place. Although the worker has not made any allegation of sex discrimination, the employer clearly thinks she is likely to do so and is attempting to intimidate her out of doing so. This is victimisation.

The employer has a defence only if the member made a false allegation in bad faith.

For example:

A worker who is disciplined for making an allegation of sex discrimination which is found to be wrong must not be victimised as long as she genuinely believed the allegation was true when she made it.

Points to note:

- *Be careful because potential victimisation claims are frequently missed. Be alert to any change in the employer's attitude or behaviour towards the worker after the allegation is made.*
- *Where an allegation of sex discrimination is made, it should be explicit, unambiguous and in writing, so that the making of the allegation can be proved.*

Victimisation is an industrial relations issue as well as a legal issue. Many employers with policies against direct and indirect discrimination have not thought about how to avoid victimising a worker who makes an allegation of sex discrimination.

See below for further illustrations and a checklist on victimisation.

How to spot victimisation in the workplace

The law against victimisation is designed to enable workers to raise issues of discrimination without fear of

retaliation. You need to look out for:

- The 'trigger' or 'protected act', ie the way the member originally raised the discrimination issue. You must be able to prove the member did this.
- Evidence that the employer reacted badly to the issue being raised. It is often worth comparing the employer's treatment of the member before and after the allegation of discrimination.

If victimisation could be an issue, remember to ask the member:

- Did s/he ever allege discrimination?
- If so, when? Was it in writing? Were there witnesses?
- Did s/he make it clear that s/he was alleging race or sex discrimination?
- To whom was the allegation made? What was that person's immediate reaction? Were any hostile comments made?
- How did the employer react? Has s/he been treated differently before and after s/he made the allegation? Has s/he been treated differently from other workers who have made no such allegations?
- Check dates. It is hard to prove victimisation if there has been a very long time between the original allegation and the subsequent victimisation, unless there have been other incidents of victimisation in between.

An example of victimisation

Campbell v Leeds United FC (2008)

Ms Campbell, an assistant conference and banqueting manager, brought a discrimination claim against her employer, Leeds United FC in 2005. After the tribunal hearing but before the outcome had been given, the club Chairman questioned her veracity in his programme notes. The next month, the tribunal gave its decision in her favour. On her return to work in February 2006 after absence due to a road traffic accident, the first words of a Mr H were 'fucking hell, here we go again'. She was given menial tasks to perform, subjected to a wall of silence by other staff and contrary to normal practice, not provided with lunch. When she raised a grievance, there were obstructions and delays in dealing with it.

A tribunal found Ms Campbell had been victimised because of her earlier discrimination claim. No one else had been subjected to aggressive comments by Mr H or faced a wall of silence or faced a refusal to deal adequately with their grievance.

Comment – the crucial evidence of victimisation was:

- *The protected act – Ms Campbell brought an ET claim for discrimination.*
- *The employer was angry about the claim – demonstrated by the programme notes and by Mr H's comment on her return.*
- *Ms Campbell was subjected to hostile behaviour that other people, who had not complained of discrimination, did not have to face.*
- Refuses to agree holiday dates.
- Excludes the member from important meetings; marginalises the member or sends him/her to Coventry.
- Puts the member on tasks below his/her experience or on the least pleasant tasks.
- Denies the member promotion.
- Pressurises the member to drop the allegation, eg threatens the member with damage to his/her career if s/he persists with the allegation.

Victimisation Checklist

Triggers ('protected acts')

The member is victimised because:

- S/he has brought a tribunal case under the Equality Act.
- S/he has acted as witness in a case brought by someone else under the Equality Act.
- The employer knows the member intends to be a witness in an EqA case.
- The employer suspects the member will be a witness in an EqA case.
- S/he has brought a formal grievance alleging race or sex discrimination or unequal pay.
- S/he has informally alleged racism or sexism or raised the issue of unequal pay.
- S/he has actively represented a colleague at a grievance who alleges race or sex discrimination.
- S/he has alleged race or sex discrimination during a disciplinary hearing.
- S/he has alleged that a member of the public has discriminated against him/her.
- S/he has complained of harassment.
- S/he has objected to racist remarks.
- S/he has spoken to the Equality and Human Rights Commission.
- S/he has objected to the playing of a racist video or objected to the display of a sexist calendar which is directed towards him/her.

Forms of victimisation

As a result of the member's action, the employer:

- Disciplines or dismisses the member.
- Denies the member the usual overtime opportunities.
- Bars the member from the bonus scheme.
- Enforces petty rules against the member that were previously – and with other members – overlooked.
- Refuses transfer requests.

4 When discrimination may be permitted

Occupational requirements ('OR')

It is not unlawful discrimination for an employer to require a worker to be of a particular race or sex if, having regard to the nature or context of the work:

- it is an occupational requirement to be of that race or sex, and
- it is a proportionate means of achieving a legitimate aim.

For more detail of this general OR exception, see paras 13.3 – 13.8 of the EHRC Employment Code.

The exception will very rarely apply, but it could be used as a form of positive action.

For example: A Council decides to recruit a Somali worker to visit older people from the Somali community in their homes to take up health services. This would probably be an OR if the Council did not have a Somali worker already in post who could take up the duties. (EHRC Employment Code, para 13.09.)

The OR exception could also be used for certain jobs which require employees to be of a particular sex to preserve privacy and decency.

The same OR exception can apply if the employer requires a worker not to be married or a civil partner or to have the protected characteristic of gender reassignment.

Religious requirements

An employer can apply a requirement that a worker is of a particular sex or that s/he does not have the protected characteristic of gender reassignment or that s/he is not married or a civil partner (or married to or a civil partner of someone who has a living former spouse or partner etc) if

- the employment is for the purposes of an organised religion, and
- the application of this requirement engages the compliance principle (to comply with the doctrines of the religion) or the non-conflict principle (because of the nature of the employment, to avoid conflicting with the strongly held religious views of a significant number of the religion's followers).

For more detail of the religious OR exceptions, see paras 13.12 – 13.18 of the EHRC Employment Code.

Positive action

Positive action is optional.

Employers may take positive action if they reasonably think that:

- people with a particular protected characteristic suffer a disadvantage connected to that protected characteristic; or
- people with a particular protected characteristic have different needs; or
- participation in an activity by people with a particular protected characteristic is disproportionately low.

In any of these situations, the employer can take any action which is a proportionate means of achieving the aim of enabling or encouraging those people to overcome or minimise the disadvantage, or to participate in the activity or to meet their needs.

For example: Targeting advertising at certain groups. Chapter 12 of the EHRC Employment Code deals with positive action.

Recruitment and promotion tie-breaks

Employers cannot generally discriminate at the point of deciding who to offer a job or promotion. However, in limited tie-break situations, they can choose to appoint a worker with a particular protected characteristic. This is only where

- the preferred worker is as qualified as the other candidate to be recruited or promoted.
- the decision is a proportionate means of achieving the aim of enabling or encouraging people with the relevant protected characteristic to overcome or minimise the disadvantage of the relevant group.

Points to note:

- *It is optional for employers whether they want to carry out this type of positive action*
- *What exactly is meant by 'as qualified' is untested.*
- *The employer cannot have a policy of treating people with the relevant protected characteristic more favourably than others.*

Pregnancy and childbirth

It is permitted to treat women more favourably than men in connection with pregnancy and childbirth. However, this more favourable treatment must not go any further than is reasonably necessary to compensate the woman for any disadvantage.

Part Two: How to identify and tackle race and sex discrimination at work

5 Interviewing members: bringing up the subject of discrimination

In some cases, members will raise the subject of possible discrimination with you early in your conversation. In other cases, members might not raise the subject at all. There could be different reasons for this, eg

- They may be worried you will think they are being unreasonable. Maybe they have previously mentioned discrimination to HR or a work colleague or someone else who has put them down.
- They may fear that you will be over-enthusiastic about challenging discrimination and that they will lose control. They may be uncertain whether they want to speak out and risk repercussions from the employer.
- They may be testing your commitment to fighting discrimination. They may want to see if you raise the topic first.
- They may believe they have been discriminated against, but think it is impossible to prove.
- They may be genuinely uncertain whether they believe they have been discriminated against or simply treated unfairly.
- They may be convinced they have not been discriminated against.
- Some people may feel uncomfortable with the idea that discrimination occurs against their gender or ethnic group.

Because of these different possibilities, it is important to handle the interview sensitively and listen carefully.

Where the member belongs to a group which is commonly discriminated against, always consider the possibility of discrimination in your mind if the complaint is about unfair treatment at work, in recruitment or promotion, redundancy or other dismissal.

If the member does not raise discrimination, you need to raise the possibility yourself at some point. Do not:

- Insensitively ‘pounce’ as soon as the interview starts.
- Leave it so late, that it sounds like an afterthought.
- Only raise the possibility once you have seen something which suggests discrimination is a definite possibility. Until you raise the subject in some way, you cannot ask the necessary questions to establish if such evidence exists.

It can be useful first to offer members an opening, to see whether they want to raise the subject themselves, eg

- Ask ‘why do you think your employer did not give you

the job / made you redundant / disciplined you etc?’

- Ask ‘Does your employer have any hidden agendas? Why do you think you were treated this way?’

It may be necessary to be more direct, eg

- Ask ‘Do you think that was race discrimination?’ or ‘Do you think your employer would have promoted you if you were a man?’
- Or where it is very sensitive, ‘The law says employers must not discriminate because of race or sex and for various other reasons. Do you think any of those might apply?’

Once members tell you they think discrimination is a possibility, ask why they think that. So that they do not think you are challenging them, explain it would be very helpful to know what had led them to that conclusion.

Remember it is not your role to decide whether there has in fact been race or sex discrimination. Your role is to support members and help them decide what to do. We know there is widespread discrimination in our society but it is hard to prove. Ultimately members’ options will be affected by the strength of the evidence.

Don’t worry that you are raising false expectations by having this discussion. If the evidence to prove discrimination is weak, it might be sensible for the member not to take it any further. But at least there will have been an open discussion and proper consideration given to an important issue.

Do not avoid asking questions because you are afraid you don’t know enough about the law or the evidence needed to prove a case. The evidence and interview checklists in this guide will help you gather a lot of relevant information so that further advice can then be taken from a more experienced person through the appropriate channels.

In line with UNISON’s Race Discrimination Protocol (search www.unison.org.uk for full details), where a member or their representative believes that they have been the subject of race discrimination in their workplace, the branch must ask the member to complete a CASE form as soon as possible to ensure that any employment tribunal deadline is not missed. All CASE forms setting out allegations of race discrimination must then be forwarded by branches to the region without delay so that they can be sent to Thompsons to make preliminary legal assessment using the CASE protocol.

6 Recruitment

Direct race or sex discrimination

Points to look for:

You should consider the possibility of direct or indirect discrimination (both may be present) or even victimisation.

The following could be warning signs of direct race or sex discrimination, although none of these in themselves necessarily indicate that direct discrimination in recruitment has occurred. Information to substantiate any of these points can be collected from various sources including by interviewing the member, speaking or writing informally to the employer, taking a formal grievance, or bringing an employment tribunal case.

- The member is of a group statistically likely to be discriminated against.
Watch for:
 - Black or minority ethnic workers.
 - Pregnant workers.
 - Female workers trying to get a job traditionally associated with male workers.
- The member has not been short-listed for a job when one would expect him/her to be short-listed, comparing his/her application with the advertisement and job specification.
- Comments or questions at interview indicating hostility or stereotyping of the member on racial or gender grounds or questions regarding childcare.
- Subjective recruitment procedures. (The purpose of objective procedures is to reduce the chances of direct discrimination.)
Watch for:
 - Decision-making by one individual or one individual with particular influence on a panel.
 - No pre-fixed selection criteria.
 - No objective marking or scoring system.
 - Pre-fixed criteria which are departed from by the decision-makers.
 - Breach of the employer's own recruitment or equal opportunities procedures.
 - Breach of relevant guidelines in the EHRC Employment Code of Practice (see in particular chapter 16).

Unsatisfactory or vague reasons for rejection and explanations such as the member would not "fit in".

- An existing workforce, particularly at the relevant level and at the highest levels, which is dominated by one race or sex.
- If someone else has been appointed, s/he is patently less suitable for the job and is of a different race or sex.

Indirect Race or Sex Discrimination

Points to look for:

To spot hidden indirect discrimination, look out for the following:

- Informal recruitment procedures which may indirectly discriminate, particularly where existing staff are mainly white or male.
Watch for:
 - Word of mouth recruitment. (Depends on knowing/being friendly with existing workers and on the attitude of existing workers as to who is employed in the workplace.)
 - Never advertising due to a high level of 'on-spec' demand. (Benefits those who know existing workers so they can write in at times of vacancies.)
 - No application forms, or application forms which do not specify what information is required. (Benefits those who know existing workers and who have more inside information about the workplace and know what is relevant.)
- Where are advertisements placed? Are they put in places or with organisations that will not be seen by certain groups? (Although remember that targeted advertising can be a form of positive action.)
Watch for:
 - Advertisements placed in job centres in primarily white areas.
 - Visits to mainly white or single-sex schools to promote interest.
 - Recruitment of temporary or permanent staff through agencies in all white areas.
 - Recruitment through a union office where union members are primarily white male.

- Is the job advertised internally and externally?

Watch for:

- Ring-fencing or keeping jobs internal. This can be indirect discrimination where existing and internal staff are mainly white or of one sex.

- Method of selection – over-emphasis on interviews can disguise hidden requirements of fluency, articulacy, confidence etc and tends to benefit white male workers or workers with an academic background.

Watch for:

- Preliminary telephone interviews.
- Over-emphasis on interview performance.
- Interview arrangements (at short-notice or awkward times) which could cause attendance problems for workers with childcare responsibilities.

- Requirements of the job – these should be kept to the minimum necessary and relevant to the job.

Watch for:

- Excessive qualifications.
- Previous experience at certain levels, specific types of previous experience, good record of previous promotions, previous management experience, previous acting-up experience etc. (This type of requirement is a key issue of indirect discrimination – as black workers are often concentrated in the lower levels of the workforce, measuring potential only by what level they have already achieved puts them into a catch 22 situation.)
- Requirements as to how the job should be performed, eg dress and appearance, late night working, no provision for extended unpaid leave.
- Full-time work requirements; shift-working; overtime requirements.

For a fuller list of possibly discriminatory provisions, criteria or practices, see pages 15-16 (race) and 18-20 (sex).

Victimisation

The member may not be recruited because it is known that s/he previously alleged discrimination against this employer or a former employer.

For full checklist on victimisation, see page 24.

Recruitment: Checklists for interviewing the member and gathering evidence

When assessing an individual case, there are various formal and informal methods of gathering information.

These include:

- Interviewing the member effectively.
- Obtaining information from the employer through informal conversations, letters, formal feed-back.
- Other research.

[1] Direct race or sex discrimination

- Ask the member why s/he thinks s/he did not get the job.
- Check the job description, person specification and advertisements to see what the employers required. How well did the member match this?
- Ask what reason the member was given as to why s/he did not get the job. Check whether this is in writing.
- Ask the employer to inform you or the member in writing why the member did not get the job. Does this explanation stand up to scrutiny?
- Compare the member's application with the information at 2-4 above. Look for inconsistencies by the employer.
- Try to find out whether anyone else was short-listed or appointed and if so, how they compare with the member's application and with what the employer asked for in the paperwork. Were they of a different race or sex?
- Check the objectivity of the recruitment process, eg:
 - Was the member issued with a job description and person specification setting out identifiable selection criteria?
 - Did more than one person interview the member?
 - Were notes taken?
- Check for other indicators of discrimination. See warning signs on pages 27-28.

Point to note: Although it helps to compare the member with a successful candidate of a different race or sex, this is not essential to prove direct discrimination, as there can be other indicators such as at points 4, 5 and 7 above.

[2] Indirect discrimination: looking for hidden provisions, criteria or practices

- 1 Ask the member why s/he thinks s/he did not get the job.
- 2 Ask what reason the member was given as to why s/he did not get the job. Check whether this is in writing.
- 3 Ask the employer to inform you or the member in writing why the member did not get the job.
- 4 Check the job description, person specification and advertisements to see what the employer required. Also check the recruitment process to see whether the process itself contained discriminatory requirements.
- 5 If at any of the stages 1–4 above, you find a provision, criterion or practice which disadvantaged the member, there may be an element of indirect discrimination. See pages 15-16, 19-20 and 27-28 for examples of discriminatory requirements generally and in recruitment. To check whether there is indirect discrimination on this occasion, go on to stages 6–9 below.
- 6 Check whether the likely reason the member did not get short-listed/appointed was a result of his/her failure to meet the particular provision, criterion or practice.
- 7 Note whether the provision, criterion or practice was applied to all workers regardless of their race or sex.

Point to note: If the requirement was applied only to the member, then there could also be a case of direct race or sex discrimination, eg a worker, who is black, is told s/he has not been recruited because s/he has inadequate management experience, whereas the person who is recruited, who is white, has no more management experience than the worker.

- 8 Consider whether the provision, criterion or practice particularly disadvantages those of the member's race or sex compared with those not of the member's race or sex.
- 9 Consider whether the employer will be able to come up with a good objective justification for insisting on any such provision, criterion or practice.
- 10 If the answer to stages 6–8 is yes and to stage 9 is possibly no, then the member may win a case of indirect discrimination. You should look out for whether any other workers of the same sex or racial group as the member were also disadvantaged by the provision, criterion or practice. They may also have an indirect discrimination case.

[3] Victimisation

- 1 Ask the member if s/he has previously made any allegation of race or sex discrimination against his/her former employer or the employer to whom s/he is now applying.
- 2 If so, ask for details as to when, what the allegation was, against whom it was made, what was the reaction at the time.
- 3 Would those making the decision to recruit know about the former allegation? Would it have upset them?
 - Did the member do anything else by reference to the EqA which may have upset the recruiter? For example, did the member challenge the recruiting employer on any discrimination issue during the interview?
 - Looking at the job description and person specification, the member's application, the employer's reasons for rejecting him/her, and the successful candidate(s), does the evidence suggest the member should have been short-listed/recruited?

[4] Possible action in an individual case

- Gain further information, formally or informally, with a view to deciding whether or not to take legal action. (Watch time-limits. See summary page 54.) An informal approach, eg a letter asking why the member was unsuccessful, may be the best first step.
- The member can take a discrimination case to the employment tribunal. (If a worker of a different racial group or sex was recruited, this indicates possible direct discrimination. If the member has not yet established the exact reason s/he was rejected, an indirectly discriminatory criterion could emerge. Where the evidence suggests that each is a real possibility, both direct discrimination and indirect discrimination can be claimed.)
- Where more than one worker has been affected, take several individual cases at the same time. (This is particularly suited to indirect discrimination cases.)
- Negotiate a change in the employer's appointments/promotion policy.

7 Promotion

Direct race or sex discrimination

Points to look for:

As when the member is being recruited, there is a risk when applying for promotion of both direct and indirect discrimination. The purpose of objective procedures is to reduce the chances of direct discrimination. The following could be warning signs, although none of these in themselves necessarily indicate that direct discrimination has occurred in the promotion procedure. Information to substantiate any of these points can be collected from various sources including by interviewing the member, speaking or writing informally to the employer, taking a formal grievance, or bringing an employment tribunal case.

- The member is of a group statistically likely to be discriminated against.
Watch for:
 - Black or minority ethnic workers.
 - Pregnant workers.
 - Workers trying to get a supervisory position over workers primarily of another race/sex.
- The member has not been short-listed for a job when one would expect him/her to be short-listed, comparing his/her application with the advertisement and job specification.
- Comments or questions at interview indicating hostility or stereotyping of the member on racial or gender grounds or questions regarding childcare.
- Subjective promotion procedures.
Watch for:
 - Decision-making by one individual or one individual with particular influence.
 - No pre-fixed selection criteria.
 - No objective marking or scoring system.
 - Pre-fixed criteria which are departed from by the decision-makers.
 - Breach of the employer's own recruitment or equal opportunities procedures.

Breach of relevant guidelines in the EHRC Employment Code of Practice (see in particular paras 17.82 – 17.90).

- Unsatisfactory or vague reasons for rejection.
- Few employees of the member's race/sex at higher levels in the organisation including at the level to which the member attempted to get promoted; general pattern of promoting more men/white workers than women/black workers.
- Past failed promotion attempts.
- The member has successfully 'acted-up' or 'substituted' in the higher grade post in the past.
- Other evidence of discriminatory tendencies by those making the decision:
 - Towards other black/female workers.
 - Towards the member.
- If someone else has been promoted, s/he is patently less suitable for the job and is of a different race or sex.

Indirect race or sex discrimination

Points to look for:

- To spot hidden indirect discrimination, look out for the following points:
- Merit promotions, not made in response to specific vacancies. What hidden criteria are in fact applied? Who makes the decision?
- Does the promotion require nomination by a particular manager first?
- Reliance on management assessment or appraisals (past or present). On what criteria is the assessment based? Is 'management assessment' a discriminatory requirement in itself, if the manager making the assessments treats black/ethnic minority staff/women less favourably?
- How is the promotion advertised? Is it at a time or in a place where certain staff may not see it?
- Is the position only available by internal promotion rather than to external candidates? This would discriminate if the existing workforce is all white or of one sex. Black/female workers would only gain access to the lower levels of the organisation and it would

take a long time for them to work up to the higher positions (especially if management controlling the promotions was all white/male.)

- Method of selection – over-emphasis on interview performance can disguise hidden requirements of fluency, articulacy, confidence etc and tends to benefit white male workers or workers with an academic background.
- Requirements of the job – these should be kept to the minimum necessary and relevant to the job.
Watch for:
 - Excessive qualifications.
 - Previous experience at certain levels, specific types of previous experience, good record of previous promotions, previous management experience, previous acting-up experience etc. (This type of requirement is a key issue of indirect discrimination. As black workers are often concentrated in the lower levels of the workforce, measuring potential only by what level they have already achieved puts them into a catch 22 situation.)
 - Requirements as to how the job should be performed, eg dress and appearance, late night working, no provision for extended unpaid leave.
 - Full-time work requirements; shift-working; overtime requirements

See fuller list of possibly discriminatory requirements on pages 15-16 (race) and 18-20 (sex).

Victimisation

The member may not have been promoted because those making the decision know that s/he has previously alleged race or sex discrimination against the organisation.

For full checklist on victimisation, see page 24.

Promotion: Checklists for interviewing the member and gathering evidence

When assessing an individual case, there are various formal and informal methods of gathering information. These include:

- Interviewing the member effectively.
- Obtaining information from the employer through informal conversations, letters, formal grievances.
- Other research.

The checklists in this guide are designed to help you ask the right questions for potential legal claims. As the procedure for cases of promotion is broadly similar to the procedure for recruitment, there are cross-references to the Recruitment checklists (pages 27-29).

[1] Direct race or sex discrimination

See:

Points to look for at pages 30-31.

Checklist on Recruitment on page 28.

[2] Indirect discrimination: looking for hidden provisions, criteria or practices

See:

Checklist on Recruitment on page 29.

Examples of generally discriminatory provisions, criteria or practices on pages 15-16, 18-20 and 24.

[3] Victimisation

- 1 Has the member previously raised an issue of race or sex discrimination with the employer?
- 2 If so, would those involved in the current promotion decision know about it?
- 3 Get details as to nature and date of allegation and employer's reaction. Is this in writing or can it otherwise be proved?
 - Is there any evidence of a change in the employer's attitude before and after the allegation was made?
 - Looking at the job description and person specification, the member's application, the employer's reasons for rejecting him/her and the successful candidate(s), does the evidence suggest the member should have been short-listed/promoted?

[4] Possible action in an individual case

- The member can take a case to the employment tribunal for discrimination. (If a worker of a different racial group or sex was promoted, this indicates possible direct discrimination. If the member has not yet established the exact reason s/he was unsuccessful, an indirectly discriminatory criterion could emerge. Where the evidence suggests that each is a real possibility, both direct discrimination and indirect discrimination can be claimed.)

- If the worker intends to bring an employment case, it may be useful to bring a grievance first, though being sure not to miss time-limits. A grievance can be useful to:
 - Find out more information and to help decide whether there is enough evidence to bring a tribunal case.
 - Formally record the allegation of discrimination in case the worker wishes to bring a case in the future.
 - Reach an acceptable negotiated solution.
- Where several workers have been similarly affected, take several individual cases at the same time. (This is particularly suited to indirect discrimination cases.)
- Negotiate a change in the employer's appointments / promotion policy.

8 Redundancy selection

Direct race or sex discrimination

Points to look for:

The following could be warning signs of direct race or sex discrimination, although none of these in themselves necessarily indicate that direct discrimination in redundancy selection has occurred:

- The member is of a group statistically likely to be discriminated against.
Watch for:
 - *Black or minority ethnic workers.*
 - *Pregnant workers.*
 - *Women, particularly in a male dominated profession or industry.*
- An illogical or unfair selection pool has been chosen, which appears to target those of a particular race or sex, or enables the employer to target the particular member or bring him/her into contention for redundancy.
- Subjective selection procedures, subjective and ill-defined criteria, subjective and inconsistent marking.
- The member is marked inaccurately against the selection criteria and/or the member's work is assessed by managers who have no first-hand knowledge of it.
- The employer has departed from its own redundancy policy with no clear reason or coherent alternative method.
- There was no clear reason for selecting the member for redundancy.
- There is a pattern in terms of those retained or selected for redundancy according to race or sex.
- In particular, the member can identify a person of a different race or sex who has been retained who:
 - On the selection criteria applied by the employer should have scored less successfully than the member.
 - For other reasons would seem more obvious to select for redundancy than the member, eg s/he

has a very poor conduct record or has only just started employment.

- The workforce as a whole including management, personnel and those making the redundancy selection, is dominated by one race or sex.
- There is other evidence of discrimination against the member in particular or against black or women workers generally in the workplace.

Indirect race or sex discrimination

Points to look for:

Traditionally the favoured method of redundancy selection has been 'Last In, First Out' (LIFO). This method is superficially attractive as it seems to ensure objectivity and feels fair. It has become less popular with employers in recent years as it does not distinguish between the skills and capabilities of workers retained and dismissed. From an equal opportunities point of view, LIFO has been severely discredited because workers with shortest service tend to be those from disadvantaged groups.

The search for other objective criteria to replace LIFO is not easy and many alternative criteria also have hidden discriminatory effects. In any redundancy selection, the following criteria need to be carefully considered for their impact on workers:

- Attendance (particularly if reasons for absence are not differentiated).
Warning:
 - *Foreign born workers may need more unpaid leave/extended holidays to visit family abroad, particularly if anyone is ill.*
 - *Women workers may take more time off for child-care or gynaecological reasons.*
- Job proficiency (as opposed to potential).
Warning:
 - *Longer serving workers will have acquired greater job proficiency than newer workers who are still learning and being trained. This may disadvantage black/women workers.*
- Merit assessments (past or present).
Warning:

- *Assessments, particularly when carried out by one manager, can be very subjective and black/women workers are vulnerable to conscious or unconscious discrimination, stereotyping or misunderstanding.*
- *Reliance on past appraisals or personal development plans carries similar problems.*

- Customer complaints.

Warning:

- *Black workers may be subject to a number of racist complaints from the public.*

- Seniority – status or length of service.

Warning:

- *Whether this targets any particular minority ethnic or gender group depends on the workforce in question.*

- Contract workers.

Warning:

- *Many workers are employed for years on a succession of fixed-term contracts, carrying out exactly the same job as permanent employees. These workers are often disproportionately black/women.*

- Flexibility with hours and shifts/mobility.

Warning:

- *Shift working and flexi-hours are a particular issue for women workers. Late night shifts may involve dangerous travel home for Asian as well as women workers.*

Victimisation

The member may have been selected for redundancy because s/he has previously made an allegation of race or sex discrimination against the employer.

For full checklist on victimisation, see page 24.

Redundancy: Checklists for interviewing the member and gathering evidence

When assessing an individual case, there are various formal and informal methods of gathering information. These include:

- Interviewing the member effectively.
- Obtaining information from the employer through informal conversations, letters, formal grievances.
- Other research.

[1] Direct race or sex discrimination

- 1 Ask the member why s/he thinks s/he was selected for redundancy.
- 2 Ask what reason the member was given as to why s/he was selected. Check whether this is in writing.
- 3 Ask the employers to inform you or the member in writing why the member was selected. Does this explanation stand up to scrutiny?
- 4 Compare the member's likely/actual marking against the redundancy selection criteria with the likely/actual marking of retained workers, particularly those of a different race or sex. Look for inconsistencies by the employer.
- 5 Check the objectivity of the redundancy selection process, eg:
 - Were specific, unambiguous and measurable selection criteria set out in advance?
 - Was the marking system objective and consistent and by managers who had first-hand knowledge and information?
 - Were notes taken?

Check for other indicators of discrimination.
See warning signs on page 32.

[2] Indirect discrimination: looking for hidden conditions and requirements, provisions, criteria and practices

- 1 Ask the member why s/he thinks s/he was selected for redundancy and what criteria were applied.
- 2 Ask what reason was given to the member by the employer and check whether it is in the dismissal letter or in writing elsewhere.
- 3 Get the employer to put in writing why the member was selected and what criteria were applied, in what order and on what weighting.
- 4 Check other documents indicating what criteria were applied, eg previous letters to the member, internal minutes of the employer, correspondence with the union in advance of the selection.
- 5 If at any of the stages 1 - 4 above, you find a provision, criterion or practice which the member could not meet, there may be an element of indirect discrimination. See pages 15-16, 18-20 and 33 for examples of discriminatory provisions, criteria or practices generally and in redundancy selection. To check whether there is indirect discrimination on this occasion, go on to stages 6-9 below.

- 6 Check that the likely reason the member was selected for redundancy was a result of the provision, criterion or practice.
- 7 Note whether the provision, criterion or practice was applied to all workers regardless of their race or sex.

Point to note: If the requirement etc was applied only to the member, then there could also be a case of direct race or sex discrimination, eg an employer decides to select the member because s/he has no qualifications, whereas other unqualified workers of a different race or sex are retained.

- 8 Consider whether the provision, criterion or practice puts others of the member's race or sex at a particular disadvantage compared with those not of the member's race or sex.
- 9 Consider whether the employer will be able to come up with a good objective justification for the provision, criterion or practice.
- 10 If the answer to stages 6-8 is yes and to stage 9 is possibly no, then the member may win a case of indirect discrimination. You should look out for whether any other workers of the same sex or racial group as the member were also disadvantaged by the requirement. They may also have an indirect discrimination case.

[3] Victimisation

- 1 Ask the member if s/he has previously made any allegation of race or sex discrimination or harassment against the employer.
- 2 If so, ask for details as to when, what the allegation was, against whom it was made, what was the reaction at the time.
- 3 Would those making the decision who to select for redundancy know about the former allegation? Would it have upset them?
Looking at the redundancy selection criteria and process generally, is it odd that the member has been selected for redundancy?

[4] Possible action in an individual case

- An appeal by the member, raising the issue of discrimination, with a view to:
 - Securing reinstatement; or
 - Finding out more information to assess whether there is evidence to bring a discrimination case.

- Gain further information, formally or informally, with a view to deciding whether or not to take legal action. (Watch time-limits – see page 54.)
An informal approach, eg a letter asking why the member was selected may be the best first step.
- The member takes a case to the employment tribunal for discrimination. This may be direct and/or indirect discrimination or even victimisation.
- Take several cases at the same time on behalf of several workers who have been similarly affected. (This is particularly suited to indirect discrimination cases)
- Negotiate a change in the employers' redundancy policy.

9 Disciplinary action or dismissal for misconduct

Direct race or sex discrimination

Points to look for:

The following could be warning signs of direct race or sex discrimination, although none of these in themselves necessarily indicate that direct discrimination in redundancy selection has occurred:

- There is little evidence that the member committed the offence or if s/he did, the disciplinary sanction seems unusually harsh compared with what is said in the disciplinary procedure or usual practice or common sense.
- The procedures followed were noticeably aggressive, one-sided or unfair, eg
Watch for:
 - Rushing through the process
 - Ignoring evidence which might be in the member's favour
 - Showing a closed mind
 - If the member is black, showing more interest in white witnesses than black witnesses who are equally relevant. If the member is a woman, paying more attention to male witnesses against her than eg a supportive female manager.
- Racist or sexist remarks made by a relevant decision-maker
- A comparator, ie someone of a different race or sex who has done the same misconduct but received a lesser sanction. This is the best evidence, provided
 - The employer knew the comparator had done the same misconduct
 - The comparator definitely received a lesser sanction
 - There is not a neutral explanation for the different treatment, eg
 - The comparator's conduct was not quite so bad
 - The comparator had a better disciplinary record overall or was a more important person to the organisation for other reasons
 - The same decision-maker was involved, so the explanation is not simply that some managers are tougher than others
 - The comparator's offence was relatively recent, so it is not that management has recently become stricter with everyone.

- If there is no comparator who has done exactly the same offence, then a comparator who has carried out offences of equivalent seriousness but has been treated less harshly, or evidence that the employer is generally relaxed about disciplinary matters and this was an exception.

Victimisation

The member may have been disciplined or dismissed because s/he previously alleged discrimination against the employer.

For full checklist on victimisation, see page 24.

Misconduct: Checklists for interviewing the member and gathering evidence

When assessing an individual case, there are various formal and informal methods of gathering information.

These include:

- Interviewing the member effectively.
- Obtaining information from the employer through informal conversations, letters, formal feed-back.
- Other research.

Your approach will depend on when you first become involved in the matter and when the possibility of race or sex discrimination first comes up.

[1] Direct race or sex discrimination

- 1 Look at the disciplinary / dismissal letter and the disciplinary procedure. Other documents will also be relevant, eg the letter inviting the member to the disciplinary and the investigation report. Check any policies relevant to the offence.
- 2 Ask the member for his/her comments. In particular, does s/he
 - Deny s/he did the misconduct?
 - Accept s/he did it, but say it was not as serious as it sounds?
 - Accept s/he did it, but say that it was accepted practice in the workplace?
 - Accept s/he did it, but say that the sanction was excessively harsh?
- 3 Check the member's disciplinary record including expired warnings and warnings for both similar and different offences.
- 4 Is the member aware of anyone of a different race or sex who has done the same misconduct or something

similar, but been treated less harshly?

- 5 If so, ask the member for more information about this comparator:
 - How long has s/he worked there (compared with the member)?
 - Does s/he have the same job as the member?
 - Does s/he have the same manager?
 - What kind of disciplinary record does s/he have? (The member may not know.)
 - What exactly did s/he do and when?
 - What action, if any, was taken against him/her?
 - If none, would the employer have known s/he did that misconduct?
 - Can the member guess what explanation the employer might give for the different treatment?
- 6 Any other evidence of race or sex discrimination by the decision-maker(s) involved, eg
 - Racist/sexist remarks during the process or at other times
 - Other discriminatory treatment of the member
 - Other discriminatory treatment of other women / black workers etc as relevant.

[2] Victimisation

- 1 Ask the member if s/he has previously made any allegation of race or sex discrimination against his/her employer.
- 2 If so, what exactly did the member say, to whom and when?
- 3 Can it be proved? Was it in writing? If not, was there a witness?
- 4 Does any manager involved in the current disciplinary action / dismissal know about the allegation?
- 5 Is there evidence that the organisation knew about the allegation and was upset by it? Have there been any other acts of victimisation between the date of the allegation and the date of the current disciplinary action?
- 6 Did the member commit the same alleged misconduct both before and after making the allegation of race or sex discrimination? If so:
 - Did the employer know about the earlier misconduct?
 - Did the employer overlook or accept the earlier misconduct?
 - Will the employer be able to explain why s/he took no action on the earlier misconduct but has taken serious action on the current misconduct?

- 7 Is there a comparator, ie a work colleague who has never alleged race or sex discrimination, who has committed the same misconduct and received a lesser or no sanction?
- 8 Having looked at the facts and the disciplinary procedure, does the action taken against the member seem surprisingly harsh?

[3] Possible action in an individual case

The member can take a case to the employment tribunal for discrimination. If s/he has been dismissed, is an employee and has two years' service, s/he may also have an unfair dismissal claim.

Gain further information, formally or informally, with a view to deciding whether or not to take legal action. (Watch time-limits. See page 54.) An informal approach, eg a letter asking why the member was unsuccessful may be the best first step.

10 Racial and sexual harassment

The harassment itself

Guidance

The Equality and Human Rights Commission *(‘EHRC’) has a useful section on harassment in chapter 7.

The EC Code on Sexual harassment has useful thoughts and observations, which should be respected even post Brexit.

Race

The definition of harassment is set out in section 26(1) of the EqA. Applying it to the protected characteristic of ‘race’ it says:

- a A person (A) harasses another (B) if –
- b A engages in unwanted conduct related to race, and the conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Harassment is therefore unlawful either where the harasser intends to violate the member’s dignity etc, or where the harasser has no such intention, but that is nevertheless the effect of the harasser’s actions.

In judging whether harassment has the said effect, the EqA says it is not enough that the member subjectively feels his/her dignity has been violated etc. The tribunal must also take into account the other circumstances and whether it is reasonable for the conduct to have that effect.

Points to look for:

- *Watch for comments, nicknames, so-called ‘banter’ and ‘jokes’, abuse which are race specific or which would not be said to a white person. Physical assaults would also be covered.*
- *Harassment can be related to the race of someone else. For example, a white worker may feel harassed by having to listen to colleagues making racist remarks.*

Sex

Both male and female workers can be subjected to sexual harassment. As the statistics show that women are far more commonly subjected to harassment than men,

the law is drafted using a woman as an example. However, it applies equally where a man is subjected to harassment.

There are three definitions of harassment in s26 of the EqA. The first definition applies to harassment related to sex, gender reassignment and race, as well as certain of the other protected characteristics in the EqA: (1) A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of –
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

There are two further forms of harassment in s26: (2) A also harasses B if –

- (a) A engages in unwanted conduct of a sexual nature, and
- (b) The conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- (c) because of B's rejection of or submissions to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

- In summary, it is harassment if:
 - the member is subjected to unwanted conduct
 - related to sex or gender reassignment, or
 - of a sexual nature
- which is either intended to violate his/her dignity or to create an intimidating etc environment, or
- even if it is not intended, it has that effect, taking account of
 - the member's perceptions
 - the other circumstances, and
 - whether it is reasonable to have that effect.
 It is also harassment to treat the member less favourably because s/he has rejected such conduct or indeed because s/he has submitted to it.

Points to watch for:

- Watch for comments, nicknames, so-called 'banter'

and 'jokes' or abuse which are of a sexual nature or sex specific or which would not be said to a man. Physical assaults would also be covered.

- Harassment can be related to the gender of someone else. For example, a man may feel harassed by having to listen to colleagues making sexist 'jokes'.
- With sexual harassment, rejection of sexual 'advances' often leads to non-sexual bullying, shouting, sending to Coventry, threats and warnings. Watch for a sudden deterioration in the work relationship and new criticisms of the member's quality of work.

The employer's legal liability for the harassment

- Employers are legally responsible for harassment which has already been carried out by one member of staff against another, even if they were unaware of such harassment and disapprove of it (and sack the perpetrator when they find out what has been happening). There are two exceptions:
 - The harassment did not occur in the course of employment, eg took place after hours, off work premises and not on work-related business. (However, harassment occurring during work outings or even when work colleagues go out together for a drink straight after work is probably covered.)
 - The employer had taken all reasonable steps to prevent any harassment happening (see pages 8-9 on vicarious liability).

- The law is more complicated if harassment is carried out by an external person, eg a member of the public or a patient.

The EqA originally contained a specific offence of 'third party harassment', which made the employer automatically responsible for such harassment if they hadn't taken reasonable preventative steps. Unfortunately, this was repealed by the coalition government in 2013, which makes it more difficult to hold employers responsible. (The EHRC Code is currently out of date on this point.)

Nevertheless, in some circumstances, employers may still have legal responsibilities if their failure to deal with harassment of which they are made aware amounts to direct discrimination or harassment in itself (see below).

- There are other legal remedies including the Protection from Harassment Act 1997, which may be useful in harassment situations. Unfortunately, these are less accessible than the EqA, because they

involve bringing a case in a county court or in the high court, rather than an employment tribunal. They are therefore outside the scope of this guide.

- For further information and guidance regarding the law on harassment and handling of a grievance, see chapter 15 in the UNISON law book, 'The Law and You'.

The employer's handling of a complaint

The employer's handling of a complaint of harassment may be incompetent, unsympathetic or unfair. It may also amount to further harassment or acts of direct discrimination or victimisation. For example:

- If employers handle a complaint of harassment by a woman or black worker less seriously than they would handle a comparable complaint by a man or white worker, this may be direct discrimination in the handling of the complaint or further harassment. This can apply whether the harassment complained of is between members of staff or by members of the public towards members of staff.
- Watch for casual treatment of the complaint, eg remarks made indicating the complaint is not taken seriously, taking an extremely long time to investigate and deal with the complaint, not following the normal grievance procedure or any suitable alternative.
- Watch for more favourable treatment of the alleged perpetrator during any investigation, eg the alleged harasser is given the member's statement at the outset and kept informed of all the evidence against him/her, whereas the member never sees the harasser's statement and is generally kept in the dark.
- Suspending or transferring the member who complained of harassment, rather than the alleged perpetrator, whether during or after the investigation, may also be direct discrimination on grounds of race or sex or further harassment.
- If the employer punishes the member in any way for alleging harassment, this may be victimisation or further harassment. This includes failing to deal with the grievance properly because it concerns an allegation of harassment.
- Suspending or transferring the member, during or

after any investigation, may be victimisation or further harassment.

- Warning or dismissing the member; starting to criticise his/her work; blocking any promotion attempts or job opportunities – all may be victimisation.

See full checklist on victimisation on page 24.

Racial and Sexual Harassment: Checklists for interviewing the member

[1] Gathering evidence of direct discrimination and victimisation

- Ask the member to tell you or write down every incident of harassment plus the date.
- Does the member have evidence of any of the harassment? Are there witnesses to the harassment? Has s/he told anyone inside or outside the workforce? Does s/he keep a diary? Has s/he been to a doctor?
- Did the member ever confront the perpetrator? If so, when and what happened? Was there a witness?
Warning: It is important to reassure the member that it is quite understandable if s/he felt unable to confront the perpetrator. The perpetrator should have known better.
- Has the member ever told HR or management? If so, who and when? What happened? Was anything put in writing?
Warning: Again it is important to reassure the member that it is understandable if s/he has not previously complained. The EC Code on Sexual Harassment recognises that workers subjected to sexual harassment often do not complain for a long time for very understandable reasons.
- If the member either confronted the perpetrator or told management, has the attitude of the perpetrator or of management towards the member changed since then? In what way?
- If the harassment or victimisation includes criticisms or disciplinary action or even dismissal:
 - What reason has been given by the employer for the action?
 - Can the member show there was no valid basis to discipline or dismiss him/her?
 - If the member has committed any minor errors,

can s/he show that other workers have not been penalised for the same errors?

- Has the employer failed to follow the usual disciplinary procedures?

- What would the member like to do?
- Interviewing workers who have been subjected to harassment is very sensitive. For a more detailed checklist on interviewing women with sexual harassment claims, see 'The Law and You' (Resources, page 56).

[2] Possible action

- Gather more evidence, eg by the member keeping a diary; approaching other workers of the same race or sex.
 - The member makes an informal approach to the perpetrator or to management, alone or with a colleague or Union Rep.
 - Take a formal grievance.
 - Bring an employment tribunal claim.
 - Collective action.
- Negotiate a better harassment policy

Warning: It is easy to miss time-limits for bringing any tribunal claim for harassment (see page 54). This means notifying ACAS under the early conciliation procedure within the time-limit and following up by presenting a tribunal case within the necessary time afterwards. Very broadly speaking, the time for notifying ACAS is within 3 months of the earliest act of harassment or at least the earliest major act of harassment. Beware of missing time-limits while management takes time to investigate.

11 Pregnancy discrimination

What is pregnancy discrimination?

- Discrimination against a woman because she is pregnant is unlawful under the EqA. It is also an unlawful detriment under the Employment Rights Act 1996. To dismiss a woman because she is pregnant is both sex discrimination and automatic unfair dismissal.
- It is also unlawful to discriminate against or dismiss a woman for a reason related to her pregnancy, eg a pregnancy-related illness or her inability to perform certain duties.
- Where a pregnant woman is disciplined or dismissed, harassed or fails to get promoted, consider whether the reason is connected with her pregnancy.
- A woman who is pregnant will also have other rights at work. See the pregnancy discrimination checklist below.
- There is a UNISON Guide, 'Pregnancy: Your rights at work' (see Resources, page 56).
- Chapter 8 of the EHRC Employment Code focuses particularly on pregnancy and maternity.

Pregnancy discrimination: checklist for interviewing the member

[1] Gathering evidence

- Did the employer know that the member was pregnant? If so, how and when did the employer find out and what was the reaction of the relevant managers?

Warning: Employers often deny they were aware the woman was pregnant. Consider how the member can prove she told her employer.

- How has the employer reacted generally to the member's pregnancy? Does the employer willingly give time-off for ante-natal care? Have there been spiteful comments or lack of tolerance for the member's increased tiredness? Has the employer shown a hostile attitude towards maternity pay or to the member returning afterwards?

- Look for changes in the employer's attitude towards and treatment of the member before and after she told the employer she was pregnant.

For example: Before she became pregnant, the employer never complained if the member had not finished all her typing by the end of the day. Now the employer recurrently complains about this.

- Look for differences in the way the employer treats non-pregnant workers in similar situations.

For example: A pregnant worker and a non-pregnant worker both come back half an hour late for lunch. The employer reprimands the pregnant worker but says nothing to the other worker.

- If the member has failed in a recruitment or promotion attempt, see also general checklist on pages 27-32.
- If the member has been disciplined or dismissed:
 - What reason was given to the member for the employer's action?
 - Is the reason in writing?
 - Does the reason stand up to examination?
 - What was the member's record and relationship with the employer prior to her pregnancy?
- If the member was made redundant, see also checklist on pages 32-35.
- How are pregnant workers usually treated by the employer or the relevant managers?

[2] Possible Action

- Informal attempt to resolve situation.
- Take formal grievance or appeal.
- Start an employment tribunal claim.
- Negotiate an improved pregnancy / maternity policy.

Warning: Beware of time-limits (see page 54), even if they coincide with the expected date of birth. A claim must be lodged in time although the tribunal may well be prepared to delay the hearing until after the birth.

[3] Related advice

A member who is pregnant may seek your advice on

any of a number of issues. Whatever she asks you, you need to make sure she knows she may have rights on all the matters set out below:

- 1 The member must find out her rights to maternity leave (whether statutory or contractual) and must understand the importance of strictly following the rules, before she goes on to leave and when she is wishing to return.
- 2 The member should check her entitlement to statutory and contractual maternity pay.
- 3 The member is entitled to reasonable time off on a paid basis for ante-natal care.
- 4 If the member is exposed to a biological, chemical or physical risk (including fatigue), she may be entitled to a modification of her duties, a reduction in hours or a fully paid health and safety suspension.
- 5 Does the member wish to return to work part-time? If so, is she entitled to change to part-time or job-share under her contract? If she is not entitled to change under her contract, may she nevertheless have an indirect sex discrimination claim if the employer refuses? (See page 42)

Warning: Be careful about tribunal time-limits. If – before she goes on leave – the member asks to return part-time and is refused, there is a risk that the 3 month tribunal time-limit is counted from this refusal.

Some cases suggest that if – on her return – the woman asks again and is refused again, the time-limit may be extended. However, it is very risky to rely on this.

- 6 Watch for indirectly discriminatory working arrangements on her return from maternity leave, eg hours and shifts incompatible with childcare.

For further detail on the above legal rights, see the UNISON Guide – 'Flexible working: legal rights and gaps in the law' (Resources, page 58).

12 Part-time working

The law on part-time working

- There is no absolute right under the legislation to work part-time, although the member may have the right to do so under his/her contract of employment.
- Some workers need to work part-time for childcare reasons. Unjustifiable refusal to allow a woman to work part-time may be indirect sex discrimination. (See pages 17-21 for the definition of indirect sex discrimination.)
- It may also be indirect sex discrimination to insist that the member works flexi-shifts or specific hours which interfere with childcare. It will not be unlawful if the employer can objectively justify imposing such hours.
- Part-timers should not be treated less favourably than full-timers, and they are generally entitled to the same terms and conditions, adjusted pro rata. Unjustifiable failure to treat part-timers equally may be unlawful under the EqA or the Part-Time Workers Regulations.
- The Part-Time Workers Regulations protect male as well as female part-timers.
- It is unlawful to victimise the member for claiming rights under the Part-Time Workers Regulations or for alleging sex discrimination.
- Any worker can ask his/her employer for flexible working arrangements. Employees with at least 26 weeks' service can make a request under the Flexible Working Regulations for a reduction or change in their hours or to work wholly or partly at home in order to care for a child under 17 (or 18 if disabled). There are rules about how to use the procedure. Employers can refuse the request on one of the specified grounds, which cover nearly every situation. However, a refusal can be challenged if it is indirect sex discrimination.
- If the member needs time off to care for dependants, settle his/her child into nursery etc., s/he may find the statutory rights to dependant leave and parental leave useful. These rights are limited and are not available to all workers. You should also check the contract of employment for additional rights.

- For more detail on the law on part-time working, dependant leave and parental leave, see the UNISON Guide – 'Flexible working: legal rights and gaps in the law' (Resources, page 56).

Points to look for: Ways in which part-timers may be discriminated against include:

- *Selection of part-timers first for redundancy.*
- *Refusing to allow women to change to part-time working after maternity leave or imposing hours or shifts inconsistent with childcare needs.*
- *More favourable terms and conditions for full-timers, eg higher hourly rates; faster progression through incremental scales; enhanced holiday and sick pay entitlements; greater training opportunities.*

13 Menopause

Overview

At any one time, a notable proportion of the workforce is likely to be experiencing some level of menopausal symptoms. Approximately 4 million aged over 50 are currently employed in the UK, where the average age for the menopause is 51. It usually starts between ages 45 – 55. The perimenopause tends to start 4 – 5 years earlier, but it can last a much shorter time. This is when hormonal changes and symptoms often begin. On average, menopausal symptoms continue for four years after a woman's last period, but they can continue for much longer.

In a survey by TUC Wales, 88% of women who were menopausal or post-menopausal said it affected working life. 58.5% said the menopause was treated as a joke. 29% said the menopause was treated negatively in the workplace. They did not necessarily put that down to animosity. They felt it was largely due to their managers' embarrassment, profound ignorance as to the effects of the menopause at work, and failure of empathy.

A variety of reports show that the menopause is still an invisible and taboo subject. Workplace awareness, management training and specific policies rarely exist. The research by TUC Wales revealed that workers without direct experience of the menopause were less aware that it affected working life or that it was treated negatively or as a joke. Women experiencing the menopause were reluctant to talk about it, especially to male managers.

Symptoms and effects at work

It is extremely important to remember that symptoms of perimenopause and menopause vary greatly between women, from mild to very severe. Key symptoms can be

- Hot flushes and body temperature swings
- Night sweats; difficulty sleeping; tiredness and lack of energy
- Difficulty concentrating or memory problems
- Heavy and unpredictable periods; bladder infections
- Headaches including migraines
- Dry eyes
- Weight gain
- Feelings of stress
- Depression and anxiety; panic attacks; crying spells
- Mood swings and irritability
- Loss of confidence and feelings of isolation

Potential effects on work:

- Being less effective due to tiredness and lack of concentration; difficulty finishing tasks; lower productivity
- Difficulty making decisions
- Difficulty in relationships with colleagues, managers and clients because of mood swings, anxiety and embarrassment over hot flushes
- Mood swings making women look less professional; losing patience and empathy with others
- Feeling stress due to deadlines, formal meetings, presentations, responsibility, having to learn something new
- Embarrassment over hot flushes or heavy periods, causing difficulties in relationships with the public and colleagues
- Difficulty working in public-facing roles where the woman can't take regular or sudden breaks, or other roles where she is tied to her desk, eg at a call centre

The law: overview

- There is no law specifically forbidding discrimination because of the menopause or menopausal symptoms. Other areas of law must be used, though none of them fit comfortably.
- Employers' risk assessments under the Health and Safety at Work Act 1974 should include specific risks to menopausal women if they are employed.
- Negative treatment of a woman because of the menopause or menopausal symptoms could be sex or age discrimination or harassment under the Equality Act 2010.
- Where the menopausal symptoms meet the definition of a disability, a disability discrimination claim might be technically easier to prove. It is also a legal basis for seeking reasonable adjustments.
- Dismissing a woman because of capability or conduct issues which the woman says relate to her menopausal symptoms, without fairly taking that into account, may be unfair dismissal.
- Equally, it could be sex or age or perceived disability discrimination to treat an older woman less favourably in terms of work opportunities because of an assumption that she is or will become less effective because of the menopause.

Sex discrimination

Direct sex discrimination law does not easily fit menopause discrimination because employers will say they would have treated a male employee with similar symptoms arising from a health condition in exactly the same way. It is therefore important to look for any evidence specifically of sex (or age) discrimination in the employer's attitude and behaviour. An example where there was such evidence is the Merchant case below.

Other examples:

- Failing to promote a woman or to give her a big project because of her age or because she is known to be menopausal and because assumptions are made about her competence and capability may be direct sex discrimination. Watch for:
 - The member is obviously suitable for the post / job opportunity
 - The person selected is a man or younger and less suitable
 - The employer cannot give a good explanation why the member was not selected
 - The member's manager or a relevant decision-maker has in the past made a dodgy remark, eg 'There is no point in promoting menopausal women because they are 'hormonal'
- Conduct or capability issues
Watch for:
 - Belittling or taking symptoms less seriously than if they were attributed to a 'neutral' health issue or even saying it is an excuse
 - Failing to get a medical report when that would normally be done with an equivalent 'neutral' health issue
 - Stereotyped comments or assumptions about the menopause or women
 - Other evidence of treating women or older women less favourably

Sex-related harassment

There may be a general workplace culture of joking or unpleasant remarks about the menopause or these might be targeted at a particular worker who is known to be going through the menopause or assumed to be because she is of a certain age. Such remarks might be evidence to support a sex

or disability discrimination claim, eg about lack of promotion or dismissal. In serious and persistent cases, they might be grounds for a harassment claim in themselves, although this is always difficult because women often 'joke along' as a coping strategy or out of embarrassment (see Harassment section above). The following are real examples taken from the research reports;

- A manager saying or permitting comments such as 'she is menopausal' or 'it must be that time of the month' when trying to suggest a woman is being irrational or difficult; but when a man behaves that way, just saying 'he must be having a bad day'
- Treating the menopause as a joke topic; making fun of women having hot flushes
- Comments such as 'Are you having one of those moments again?' if a woman is eg fanning herself, especially if said with a smirk and used as a put down
- When trying to explain to a male manager the effects of the menopause, he makes comments such as 'You sound just like my wife'
- Telling a woman to stop wearing silk tops or 'fix herself up in the toilets' because her hot-flush related stains are offensive

Sex and age discrimination (gendered ageism)

There is a parallel and overlapping issue of discrimination against older women. In some environments, this can involve marginalisation, lack of promotion opportunities and being stereotyped as 'hysterical', 'histrionic' or 'menopausal'.

Disability discrimination

Menopause is not a disability. However, for some individuals, the effects are such that it can be argued the woman has a 'disability' as defined by the Equality Act 2010. This has not yet been tested in the higher courts. There is a UNISON guide on disability generally which gives more detail on how disability discrimination works (see Resources, page 56).

Does the member have a disability?

- Under the Equality Act, a worker has a disability if she
- has a physical or mental impairment, and
 - the impairment has a substantial adverse effect on her ability to carry out normal day-to-day activities, and
 - that effect is long-term. Long-term means the effect

has lasted or is likely to last at least 12 months. It covers effects which come and go.

Substantial adverse effect on day-to-day activities could include:

- Substantial difficulty sleeping
- Difficulty concentrating, eg because of tiredness or severe migraines
- Persistently wanting to avoid people, eg because of embarrassment
- Persistent low motivation, eg because of depression. (Depression can be covered as a disability in itself)
- Difficulty carrying out activities associated with toileting
- Difficulty using transport, eg because of a frequent need for the lavatory
- A combination of various effects.

Discrimination arising from disability

Under section 15 of the Equality Act, it is unlawful to treat the member unfavourably because of 'something arising in consequence of her disability'. For example, the member is demoted because she refuses to do any more public presentations. The reason she won't do them is because of embarrassment over hot flushes.

Employers have a defence if they can prove their reason is a proportionate means of achieving a legitimate aim. This is the same wording as in the defence to indirect sex or race discrimination (see page 17).

Reasonable adjustments

If the employer knows the member has symptoms (which would amount to a 'disability') and that she is at a disadvantage as a result, the employer must make reasonable adjustments. Even if the member's symptoms do not amount to a legal 'disability', as a matter of good practice, such adjustments should be made. Suitable adjustments for the member, depending on the particular difficulty she is having, could be:

- Windows which open; control over heat and air conditioning systems; identifying hot and cold areas within the workplace so the best location can be chosen; access to fresh cold water
- Dress code; suitable uniforms – natural fabrics, dresses, provision of an additional uniform to change into during the day
- Access to nearby and well-maintained toilets and washroom facilities; ideally female only showers

- Access to quiet rest areas
- Natural light and reduced noise
- Flexible working – flexible hours, breaks, part-time and home-working. Avoiding excessively long hours. Being able to return to full-time work when symptoms improve.
- Reduction of workplace stress from eg targets, workload, bullying
- Performance management: taking account of the effect of menopausal symptoms; relaxing targets
- Time off for menopausal symptoms not counting towards targets under the sickness absence procedure or extended targets; counting individual sickness days as due to a single underlying health condition; making a personnel record so that a woman does not need to explain to each new manager why she needs time off

General workplace policy:

- Change the organisational culture. Normalise discussion about the menopause
- A specific policy for menopause
- OH campaigns to raising awareness amongst everyone of what the menopause transition might entail and to challenge negative stereotypes
- Employers designating a specific person, eg from HR, with knowledge of the issues who women feel comfortable approaching 58) for practical guides including
 - Menopause: UNISON Guidance and Model Policy.
 - A report by the DoE ('The effects of menopause transition on women's economic participation in the UK') gives an example of good practice guidance produced by North Lincolnshire County Council
 - In October 2019, ACAS introduced strong and detailed guidance on menopause at work.

Sex discrimination and menopause

Merchant v BT [2012]

(Note: this report is not taken directly from the decision.)

Ms Merchant was going through a performance management process because she was underperforming in her role and had got as far as a final written warning. As issues were continuing, management had to decide whether to dismiss her.

Ms Merchant provided a letter from her GP which said she was going through the menopause which could affect her level of concentration at times. The performance management procedure said that there must be an investigation into whether underperformance is caused by health issues. But the manager conducting the process decided not to do this. He relied on his own knowledge of the menopause from symptoms which his wife and a colleague had experienced. He decided to dismiss Ms Merchant.

An employment tribunal decided it was unfair dismissal and sex discrimination. It said the manager would never have adopted 'this bizarre and irrational approach' with non-female-related conditions. Women experience menopause in different ways with varying severity of symptoms. The manager would not have dismissed a man with ill-health and symptoms affecting his concentration in the same way. It was also against the performance management procedure. The failure to refer Ms Merchant for an OH report before deciding to dismiss her was therefore direct sex discrimination.

Disability discrimination and menopause

Davies v Scottish Courts and Tribunals Service [2018]

Ms Davies was employed as a Court Officer, responsible for assisting the Clerk in running the court. In the last 2 or 3 years, Ms Davies experienced the onset of menopause which resulted in very heavy bleeding, causing her to become severely anaemic, and she also felt 'fuzzy', emotional and lacking in concentration at times. She told her two (female) line managers, who were supportive and agreed various modifications to her duties including letting her work in a court near to a toilet.

In February 2017, Ms Davies was prescribed Cystopurin for cystitis. This comes in a granular form which needs to be diluted in water. On 22 February, Ms Davies told the Sheriff that she would need to take toilet breaks during proceedings. She kept a large pencil case on her desk which also contained the Cystopurin as well as her sanitary protection.

When returning to the court after a break, Ms Davies noticed that the items on her desk had been moved and the water jug had been emptied. She noticed two men in the public area of the court drinking water. Ms Davies was worried they were drinking the water from her desk because she could not remember if she had yet added the medication to it. She asked the men where the water had come from and told them the problem. The men said the Clerk had given it to them.

The Clerk returned to court in the middle of the situation and the health and safety team was notified. A health and safety officer visited the two court users to tell them what the medication was and to advise them to take medical advice. Later, one of the two men, who had lost his court case, appealed on the basis that he had been upset by the incident in court which caused him to lose concentration.

Ms Davies was asked the next day to provide a written account of what had happened. She did so. She said she had put the medication in the jug. Ms Davies was then called into a health and safety investigation meeting. The health and safety officer told Ms Davies that she could not have added the medication to the jug because he had found out it would have turned the water pink and tasted of cranberry. On finding this out, Ms Davies amended her written account to acknowledge that she had not added the Cystopurin.

A disciplinary investigation then took place. Ms Davies explained that she had found her pencil case open when she returned to the court, which had

personal items in it. She said she had been flustered and agitated, and that had made her forgetful about whether she had added the medication.

On 9 March, Ms Davies was referred to Occupational Health. The OH report stated that she had been suffering from peri-menopausal symptoms including heavy bleeding which caused severe anaemia, tiredness, light-headedness and fainting, and also stress, anxiety, palpitations, memory loss and pins and needles.

At the disciplinary hearing, Ms Davies also produced a personal statement. It said, 'I wasn't feeling myself that day. I was bleeding heavily, passing clots, sweating profusely. I was anxious that I had to drink lots of water because I had cystitis which can occur when I bleed heavily. I was worried about changing sanitary protection as I did not want to leak in front of members of the public and worried about leaving court to get to the toilet.' Her trade union rep said Ms Davies could not remember what was in the water and that was a symptom of the premenopausal condition.

Despite this evidence, the dismissing officer (Mr Bain) said Ms Davies had known all along that there was no medication in the jug because it had not turned pink. He said she had misled the two litigants as well as management, and later she had changed her story. He dismissed her for gross misconduct. The appeals officer (Mr McQueen) rejected Ms Davies' appeal for the same reason. She brought employment tribunal claims for unfair dismissal and disability discrimination.

Unfair dismissal

The employment tribunal said the dismissal was unfair. There was no reasonable basis for the employer's belief that Ms Davies knew there was no medication in the water and had lied about it. They had been unable to explain to the tribunal what motive she would have had for lying. They had ignored her explanation that she was confused and stressed. They did not understand the significance to Ms Davies of her pencil case having been moved. Although they had the OH report, they had not properly considered her medical condition. They also had no reasonable grounds for saying she had not shown remorse. She had said she had not intended or wanted to upset anyone. She had 20 years unblemished service. There had never been any issues regarding her conduct, performance or attendance. For these and other reasons, no reasonable employer would have dismissed Ms Davies.

Disability discrimination

The employer accepted that Ms Davies had a disability at the time of these events. The tribunal said the dismissal was discrimination arising from disability under section 15 of the Equality Act. The reason for Ms Davies' dismissal was her conduct. Ms Davies' conduct was affected by her disability because her condition caused her to be confused and forgetful about whether she had taken her medication or put it in the jug. That was why she told the two men they had drunk water containing her medication. Her disability also caused her to be anxious and raise her voice.

The tribunal said the employer had not justified the dismissal. Its aim was legitimate, ie to have honest and trustworthy staff. But dismissing Ms Davies was not a proportionate means of achieving that aim and to ignore the impact of her disability on her conduct that day. The employer could have just given her a warning.

14 Gender reassignment discrimination

Who is protected?

Overview

The EHRC Employment Code briefly summarises who is covered by gender reassignment law at paras 2.21 – 2.30.

The Equality Act 2010 protects workers who:

- Have undergone gender reassignment, ie who have already transitioned.
- Are undergoing gender reassignment.
- Intend to undergo gender reassignment.

It is not necessary to:

- Follow any medical procedure. It is enough to live and dress as a person of the opposite sex.
- Apply for or acquire a Gender Recognition Certificate.

The EqA does not explicitly protect workers from discrimination because of a variety of other transgender identities, ie because they are a gender fluid or non-binary person. It is untested whether trans people who do not wish to transition from one fixed gender to another, are protected from discrimination, eg because it would amount to perceived gender assignment discrimination (ie that they are wrongly perceived to be intending to undergo gender reassignment) or even straight forward sex discrimination.

What does gender reassignment mean under the Equality Act?

Section 7 of the EqA, says a person will have the protected characteristic of 'gender reassignment' if s/he is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the person of reassigning his/her sex by changing physiological or other attributes of sex. This process need not be under medical supervision.

For example (EHRC Employment Code, para 2.24):

A person born physically female decides to spend the rest of his life as a man. He lives as a man but does not seek medical advice because he

successfully passes as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment.

The member is protected if s/he proposed to go through gender reassignment, even if s/he never completed the process.

For example (EHRC Employment Code, para 2.25):

The member, who was born physically male lets her friends know that she intends to reassign her sex. She attends counselling sessions to start the process, but then decides to go no further. She is still protected under the law.

Terminology

The EqA uses the term 'transsexual' to refer to someone with the protected characteristic of gender reassignment. This is old-fashioned and for many people, may be offensive. UNISON prefers the term 'transgender' or 'trans'. However, if a member wants to use the specific protection offered by the EqA, it is necessary to understand the legal definition of gender reassignment and the terminology used in the statute.

Unlawful discrimination

The EqA prohibits direct discrimination, indirect discrimination, victimisation and harassment in relation to gender reassignment. As with all the protected characteristics, this includes where an employer discriminates against the member because s/he wrongly perceives the member to have the protected characteristic of gender reassignment.

Absence for gender reassignment

The EHRC Employment Code talks about absences for gender reassignment at paras 9.31 – 9.33.

As well as the usual definitions of discrimination, it is discrimination under section 16 to treat the member less favourably in relation to an absence because of gender reassignment than s/he would be treated in relation to a sickness absence, or some other absence where it would not be reasonable to treat the member less favourably.

For example (EHRC Employment Code, para 17.27):

The member, who is undergoing gender reassignment has to take some time off for medical

appointments and surgery. The employer notes these down as absences under the attendance management policy. However, when a work colleague breaks his leg skiing, the employer disregards the absences because 'it wasn't really sickness and it won't happen again'. This is potentially discrimination under section 16 against the member.

Gender recognition certificates

Quite apart from the above, the Gender Recognition Act 2004 enables people to obtain legal recognition of their acquired gender by applying for a gender recognition certificate. This is a laborious process, and many eligible people do not bother.

At the time of writing (October 2019), the government has consulted on how to make the process more user-friendly.

As already explained, a member who is undergoing or has undergone gender reassignment is protected against discrimination even if s/he does not have a certificate. Moreover, as the EHRC Employment Code says, trans people should not be routinely asked to produce their gender recognition certificate as proof of their legal gender. Such a request would compromise their right to privacy.

Confidentiality

You need to be very careful about confidentiality when helping a transgender member. You should also remember to treat the member with sensitivity, avoiding irrelevant intrusive and inappropriate questions, and using the name and pronoun which the member wishes. There is an excellent UNISON guide, 'Gender Identity: An introductory guide for trade union reps supporting trans members' (for this and other guides on supporting trans workers, see Resources, page 56).

Example of gender reassignment discrimination

This is a real case but names have been changed and initials used to preserve confidentiality.

Ms E was employed as a taxi driver. When she started employment, her name was 'Rob'. In November 2006, she explained to Mr A, one of the managers, that she would be undergoing gender reassignment. In January 2007, she started wearing women's clothes at work. On the whole, customers were supportive, but mid January,

another manager, Mr C, told Ms E that he had received 10 – 15 complaints and said that if he received any further complaints, there would be disciplinary action. The next week-end, Mr C made it impossible for DE to achieve her targets because he double-booked her on three occasions. When she complained to him, he said if she was not happy, she should leave.

One month later, Ms E arrived at work to find a cartoon strip about trans people had been put on the notice board by Mr A and someone had written her name over the drawing of the woman and the name of Mr C over the drawing of the man.

Despite wanting to be addressed as 'Debbie', the job sheets continued to refer to Ms E as 'Rob'. When she started altering her name on the job sheets, Mr C told her to stop. He claimed the Inland Revenue required the paperwork to show her name as 'Rob' for audit purposes. Mr C said he would not change the company documentation even if Ms E obtained a gender recognition certificate. She complained to Mr A, who said Mr C was acting against instructions and her name would be changed on the job sheets.

This did not happen and she resigned.

The employment tribunal said Ms E had been treated less favourably by Mr C because of her gender reassignment by exaggerating the customer complaints (there was only one of any substance), double-booking her, refusing to use the name 'Debbie' on the job sheets, wrongly telling her that this was on the accountants' advice, and refusing to recognise her new name and gender even when a gender recognition certificate was obtained.

The tribunal also found Mr A had harassed Ms E when he put up the cartoon. He had not intended to cause her distress but that was plainly the effect of what he had done.

Note: As long as Ms E was undergoing gender reassignment or had done so or proposed to do so, the employer's behaviour would have amounted to discrimination, even if she did not have a gender recognition certificate.

15 Pay and contract terms

Sex discrimination in pay and contract terms:

Equal pay law

The law against sex discrimination in pay (and contract terms) is called 'equal pay' law. It used to be contained in the Equal Pay Act 1970, but is now included in a special section in the Equality Act 2010. This is backed up by long-standing EU law. The EHRC has also produced a Code of Practice on Equal Pay (see Resources, page 56).

Equal pay is a big issue in the workplace and it might come to your attention in a number of different ways. A female member may come to you and say she is doing the equivalent work to a man but is being paid less. Or a woman might complain about the fact that workers only get bonuses for working weekends and she can never work at weekends because she has children. Or it may be that you spot a case of equal pay yourself when negotiating policies and pay packages with the employers.

Equal pay law works differently from other kinds of sex discrimination. In most cases, the member needs a work colleague of the opposite sex to compare their pay with. The following checklist gives an overview of the legal framework and tells you what evidence to look for to help decide whether the member may have a case. The law is complicated, so fuller advice will be needed.

Equal pay also law applies to men, but it comes up far less often in practice.

The legal framework

- Men and women are entitled to the same pay if they are doing
 - like work
 - work rated as equivalent on a Job Evaluation Scheme, or
 - work of equal value.
- The member must find a worker (or 'comparator') in the same employment to compare herself with.
- Employers have a defence if they prove that the difference in pay is due to a material factor other than sex.

Points to look for:

- Check what duties the member is actually carrying out
 - Is there a written job description?

- What is the member doing in practice? Can she prove it?
- What proportion of time is being spent on each element of her duties?
- Can you find a man who is paid more than the member, so that she can compare herself with him?
- Check the man is in the 'same employment' as the member.
 - They must be employed by the same or an associated employer, and – they must work at the same establishment, or
 - at a different establishment where common terms and conditions apply, or
 - there must be a 'single source' responsible for the pay differential.
- Are the member and her comparator doing 'like work'?
 - Consider what they actually do in practice.
 - Are the jobs identical?
 - If there are any differences, are they only minor?
- Even if the jobs are not the same or very similar, are they of equal value?

(This requires imagination, creative and non-stereotypical thinking.)
- Consider and compare the jobs in terms of such elements as the knowledge, skill, effort and responsibility involved.
- Some examples of where tribunals have found jobs of equal value are:
 - speech therapist/psychologist
 - packer/labourer
 - group personnel & training officer/divisional sales trainer.
- Other possibilities include:
 - laundrywoman/storeman and fork-lift truck-driver
 - clerical worker/warehouse operator
 - domestic worker/porter.
- Does the employer have a defence?
 - Has the member's job been rated as lower than a comparator's on a non-discriminatory Job Evaluation Study? If so, the member will lose.
 - What reason will the employer give for the pay differential? Can you find out and pin this down?

- Is the reason significant and relevant?
 - Is the reason a neutral reason or is it linked with gender in some way?
 - If the reason for the pay difference is indirect discrimination, is it objectively justifiable?
- Watch out for victimisation. It is unlawful sex discrimination to punish a worker for raising issues about unequal pay, or for making or trying to obtain information from a relevant pay disclosure.

Race discrimination in pay and contract terms

Unlike sex discrimination in pay and contract terms, race discrimination in pay and contract terms is just like any other kind of race discrimination. The normal definitions of discrimination apply and it is not necessary to have a real-life comparator.

- Direct race discrimination in pay is where the member is paid less because of his/her race than s/he would otherwise have been paid.

For example: The member is Ghanaian. If he had been white or not African, the employer would have paid him more.

- Useful evidence could be:
 - The member is working with colleagues of a race who are doing the same job who are paid more.
 - The member's predecessor in the same job was of a different race and was paid more.
 - The member has left and the person filling the role is of a different race and is paid more.
 - The job was advertised at a higher level of pay, but when the offer is made, it is at a lower level.
 - In general, within the organisation or department, workers of a particular race are paid less or are in lower status positions.
 - In all cases, there is no other explanation, eg a difference of sex, or length of service or qualifications and experience.

Indirect pay discrimination, sex or race

Pay rules and agreements often appear neutral but their effect is to disadvantage substantially more women than men, or more black people than white people. Criteria determining levels of pay and access to bonuses often benefit men.

- The following reasons for pay differentials may disadvantage women more than men and be indirectly discriminatory:
 - inferior pay, terms and conditions for part-timers. (This may also breach The Part-time Workers Regulations)
 - paying more for 'flexibility' and 'mobility' (unpredictable working hours, last-minute overtime, week-end working)
 - higher paid jobs involve a longer commute.
- The employer must justify any indirectly discriminatory rule. Consider:
 - what was the employer trying to achieve? (Find out and pin down)
 - was that a legitimate objective and a real need?
 - would there be a less discriminatory way of achieving the same objective?
- The following reasons for pay differentials may disadvantage women or black workers and be indirectly discriminatory:
 - pay increments, increased holiday and sick pay entitlements, based on length of service
 - paying less to workers on a fixed term contract. Note: this could also breach the Fixed-Term Employees Regulations.
- The employer must justify any indirectly discriminatory rule. Consider:
 - what was the employer trying to achieve? (Find out and pin down)
 - was that a legitimate objective and a real need?
 - would there be a less discriminatory way of achieving the same objective?

Pay secrecy clauses

Workers are allowed to talk about pay and contract terms in order to find out whether there is any connection between what someone is being paid and their race or sex (or any other protected characteristic).

- Any clause in the member's contract which says s/he is not allowed to talk about pay is unenforceable under section 77 of the Equality Act.
- The member must not be victimised because s/he has asked for pay information or given pay information in order to find out if there is discrimination in pay.

Pay reporting

Gender pay reporting

- Employers with at least 250 employees must publish annual information about pay differentials between women and men. The information is divided into four even pay-bands and provides a summary of:
 - the mean hourly rate for male and female employees
 - the median hourly rate for male and female employees
 - the mean and median bonuses paid to each
- ACAS and the Government Equality Office have produced a joint guide to the detailed rules and good practice suggestions: 'Managing gender pay reporting' (Feb 2019), available at http://m.acas.org.uk/media/pdf/9/p/Managing_gender_pay_reporting_07.02.19.pdf
- Data supplied by employers can be searched online at <https://gender-pay-gap.service.gov.uk/> A summary report on data from the first year is at www.gov.uk/government/publications/gender-pay-gap-information-regulations-summary-of-201718-data
- In addition to gender pay reporting:
 - The EHRC recommends pay audits at paragraph 163 of its Code of Practice on Equal Pay and provides guidance on its website at
 - www.equalityhumanrights.com/en/multipage-guide/equal-pay-audit-larger-organisations on how to do these.
 - Audits should be carried out to comply with the public sector equality duty. The Scottish special public sector duties (regs 7-8) explicitly require authorities with 150 or more employees to publish information on the gender pay gap. The Welsh special duties (regs 11-12) require authorities to have equality objectives addressing the cause of any pay difference.
 - Tribunals can order employers to carry out a pay audit in some circumstances when they have lost an equal pay case.
- UNISON's resources on the gender pay gap at www.unison.org.uk/our-campaigns/bridgethegap/

Ethnicity pay reporting

In October 2018, the government opened a consultation on whether it should introduce ethnicity pay reporting. The consultation closed on 11 January 2019. This followed several research reports, including one from the EHRC in 2017, which showed a complicated picture on pay differentials, with the gap differing according to gender, age and ethnic group. Causes were attributed primarily to social disadvantage, but discrimination in pay is also a possibility. If minority ethnic workers are discriminated against in terms of promotion and hours which they would like to work, as appears to be the case, lesser pay will follow.

16 Employers' policies

In practice, employers operate systems and policies governing a large range of practice for work situations. When an employer wishes to introduce a new policy or if you want to challenge an existing policy, look out for the following points:

- Is there a written and detailed Equal Opportunities Policy? Does the policy explain the meaning of all forms of unlawful discrimination and harassment? Does it relate to all aspects of the employer's conduct? Is the policy drawn to the attention of all managers and employees? Is it effectively monitored and implemented? Are staff and management trained in what it means for their work practice?
- Lack of detailed objective guidelines for various employment decisions can lead to conscious or unconscious favouritism and stereotyping and direct discrimination. Watch for a lack of objective guidelines governing decisions such as:
 - Who can apply for promotion and who gets interviewed and appointed.
 - Who is selected for redundancy.
 - Who is offered opportunities for acting-up/substitution/overtime.
 - Who is awarded pay rises or merit bonuses.

Indirect discrimination

Check for indirectly discriminatory provisions, criteria or practices in:

- Appointment and promotion procedures, systems for advertising jobs, methods of short-listing and selection.
 - Redundancy policies – procedures, selection criteria, rules on offering voluntary packages.
 - Criteria for pay rises and bonuses.
 - Practice on overtime and acting-up/substitution opportunities.
 - Shift patterns.
- (See full checklist on page 8.)

If you identify any provisions, criteria or practices in these policies which could indirectly discriminate, you could take the following action:

- Work with your branch to negotiate a change.
- Consider taking out a joint grievance.
- Consider industrial action.
- Find one or more workers to run a test case.

Points to note: If you are taking a test case, it is important that the facts are as strong as possible. It is best to find a case that will strike the employment tribunal as obviously unjust.

- In very rare cases, consider applying for an injunction, eg to prevent a local authority implementing an indirectly discriminatory redundancy selection policy.
- Where a discriminatory requirement is inserted into a worker's contract, consider applying for a declaration that it is unenforceable, eg a very wide-ranging mobility clause in a woman's contract.

Warning: These last two options are unusual and will only rarely be practical to obtain or be successful.

Other policy areas

- Is there a specific policy on harassment? Does this deal with the definition of harassment; the responsibility of both employers and other employees; training and other preventative action; a special grievance procedure? How does it compare with the EC Code on Sexual Harassment?
- Consider whether to negotiate improved rights to dependant and parental leave. (See the UNISON Bargaining Support Guides available on the UNISON website and in the Resources section, page 56.)
- Negotiate to eliminate discrimination against part-timers and open up opportunities.
- Is there a specific policy on trans issues in the workplace, covering matters such as confidentiality, record keeping, single-sex facilities and time-off?
- Is there a specific policy on menopause-related issues, covering matters such as management training, raising awareness, reasonable adjustments, and the treatment of absences?
- Employers' policies should also take account of other forms of discrimination, eg related to age, disability, religion and sexual orientation.

Using the Employment Code of Practice

- Check through the EHRC Employment Code of Practice for employment (see page 5) and note where it can be used to negotiate change.
- See also chapter 18 of the Code, which deals specifically with equality policies and practice.

The public sector equality duty

- The general duty is set out in section 149(1) of the EqA 2010 which states:
- 'A public authority must, in the exercise of its functions, have due regard to the need to –
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'
- Specific duties for public authorities have been set out in regulations. You should make yourselves familiar with these obligations. They are different in England, Scotland and Wales. The duties in Wales and Scotland are far more detailed than those for England. See Resources, page 56 for references to each of the national regulations.
- The EHRC has enforcement powers if these duties are not carried out. Other interested parties can also bring a judicial review, though that would be an expensive and heavy weight type of case.
- In the light of the above, you should:
 - Make yourself familiar with the special duties applicable in your particular country.
 - Ensure your employer takes account of its obligations when exercising every employment (and other) function.
 - Use the duty and the technical guidance to negotiate change.
 - Press for consultation through various methods, especially of people likely to be affected by a policy, and ensure their views are taken into account.

17 Time-limits, tribunals and ACAS early conciliation

An individual worker can bring a discrimination case to an employment tribunal. A case is started by lodging a tribunal Claim form through the on-line process or at one of the nominated tribunal offices.

The member can make more than one claim in the same document if relevant, eg s/he can claim direct discrimination and/or indirect discrimination and/or victimisation, or s/he can claim discrimination and/or unfair dismissal.

The member can also claim more than one act of discrimination in the same document. For example, s/he may claim that a warning and a subsequent dismissal were both acts of discrimination. Similarly, s/he could claim that his/her dismissal was race and sex discrimination.

ACAS early conciliation

It is nearly always necessary to notify ACAS under the early conciliation procedure before starting any tribunal claim. ACAS will then ask the member and the employer whether they want to try to negotiate. Unless both sides want to do this, ACAS will issue a certificate. If both sides do want to negotiate, they have up to a month to do so. If negotiation fails, ACAS issues a certificate at that point.

Note that:

- Informing ACAS does not start a tribunal claim. The only way to start a claim is by lodging a tribunal claim form with the tribunal.
- It is not possible to lodge a tribunal claim without an ACAS certificate. The certificate number is written on the form.
- The employer's name on the tribunal claim form needs to be the same (or almost the same) as the name on the ACAS notification and certificate.
- If the member wants to bring a claim against an individual discriminator as well as the organisation, s/he needs to make two (or more) separate ACAS notifications and get separate certificates.
- ACAS must be notified within the tribunal time-limit. The time taken to negotiate through ACAS is then added onto the tribunal time-limit. At least one month is allowed after the certificate.

Time-limits

The tribunal Claim form (referred to as the Claim) must arrive at the employment tribunal within the time-limit. The time-limits are very strict and need to be checked and recorded the first time a member consults you.

As already explained, the rules on notifying ACAS mean that it is ACAS which needs to be notified within the time-limit. This has a knock-on effect for the final tribunal deadline.

The time-limit is within three months of the act of discrimination. For example, if the member was dismissed due to discrimination on 20th January, the deadline is 19th April in the same year. Every act of discrimination claimed in the Claim must be within the time-limit. It is safest to consider what was the earliest act of discrimination and count the time-limit from then.

For example:

- The member receives a first warning on 3rd May, a final warning on 10th June and is dismissed on 6th July. The deadline is 2nd August the member wishes to claim that all three incidents were acts of discrimination.
- The member suffers harassment between 2nd February and 4th July; complains about it on 5th July, after which the harassment stops, but is dismissed on 20th July. To cover any of the harassment at all, the deadline is 3rd October at the latest, ie counting from the last day before the harassment stopped. But the time-limit is probably even earlier, to include all the major acts of harassment which have occurred since 2nd February. In fact, some of the harassment may already be out of time when the member first takes advice, unless it can be argued that it amounts to an ongoing act of discrimination.

Points to note:

- The time-limit on a dismissal or disciplinary warning runs from the date of the dismissal or warning, not from the date an appeal failed.
- The time-limit on a failed promotion runs from the date the employer decided not to promote the member, not from the date of the outcome of any internal grievance about it.
- This means it may be necessary to notify ACAS and start a tribunal claim before the appeal or grievance process is completed.

Late claims

If you are out of time, it may be worth trying to get the tribunal's permission to submit a late claim. The tribunal has more discretion than for a late unfair dismissal claim. The test is whether it is 'just and equitable' to allow in a late claim.

In the first example above, it may be that the member first sought the advice on 1st September. By then, only the final warning and the dismissal would still be in time. However, it would be worth asking the tribunal's permission to add in the first warning as a late claim.

Once you are late, the sooner you try to notify ACAS and get in the claim, the better. Do not make it worse by delaying before asking the tribunal's permission to put in the claim late.

Privacy and the on-line register

All employment tribunal written decisions now go onto a searchable on-line register. In a case where serious issues of privacy arise, eg a sexual harassment claim or one involving gender reassignment, either side can apply for some kind of privacy order, eg that certain individuals are not referred to by name. There is no guarantee that the tribunal will agree to make such an order because there is a strong emphasis on the importance of 'open justice'. Where someone is a victim of a 'sexual offence', then no information must be published which would lead to them being identified.

18 Compensation

Compensation for race, sex or gender reassignment discrimination in the employment tribunal is not subject to any statutory ceiling. Compensation is awarded in three categories:

- **Actual financial loss**, eg loss of earnings and pension value following a dismissal, loss of potential earnings on a failed promotion, loss of acting-up allowance etc.
- **Injury to feelings**. This can include compensation for injury to health caused by the discrimination, eg psychiatric damage. Aggravated damages can also be awarded where an employer has behaved particularly badly. The total award for injury to feelings including aggravated damages is constantly rising and hard to predict. Awards rarely fall below £1000 and in extremely serious and unusual cases can reach £44,000 or more.
- **Interest**.
- **Recommendations** The tribunal can make recommendations that employers take action which would benefit the member, eg that certain documents are removed from a personnel file. If the member is still employed and it is likely to benefit him/her, the tribunal can also recommend training of staff or management. The tribunal cannot insist on the member being reinstated or getting the next promotion vacancy. If any settlement is negotiated prior to the hearing, then there is of course no limitation on what may be negotiated.

19 Resources

Your UNISON officials. Ensure you follow the correct union procedures to get advice and help.

Books

Employment Law: An Adviser's Handbook – Tamara Lewis.

User-friendly guidance on law and practice with detailed check-lists and precedents on all areas of employment law including a large discrimination section. 13th edition: 2019. Available from Legal Action Group. tel: 0207 833 2931.

The Law and You: a UNISON guide to key employment rights.

UNISON's employment law book, with large discrimination content and cross-references to other UNISON and general publications. 5th edition: 2012. ISBN: 978 0 904198 22 5. 6th edition due 2020.

Legal updates and periodicals

UNIMAG

Popular quarterly electronic legal update for UNISON branch officials written in accessible and educational style. Now in its 11th year. Cross-refers to latest edition of 'The Law and You' and helps keep it up to date.

Published by Diversity Works Ltd. Case reports written by Tamara Lewis. For sample publicity copy and subscription details, branch officials can email unimag@diversityworks.co.uk

Codes of Practice

Code of Practice on Measures to Combat Sexual Harassment – European Commission.

Equality and Human Rights Commission Employment Code of Practice and Equal Pay Code of Practice.

Both Codes are available on the EHRC website via links at www.equalityhumanrights.com/publications/guidance-and-good-practice-publications/codes-of-practice

The public sector equality duty

Equality Act 2010 (Specific Duties) Regulations 2011 SI No 2260

Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011
SI No 1064 W.155.

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012
SI No 162

UNISON Guides

Identifying Legal Cases in the Workplace. 7th edition (2017)

Order through Learning and Organising Services
email LearningAndOrganising@unison.co.uk and quote Code ACT172.

Gender Identity: An introductory guide for trade union reps supporting trans members

Available at www.unison.org.uk/file/2010%20-%20STA%20UNISON%20trans%20guide%20for%20union%20reps.pdf or it can be ordered from UNISON comms. or from Carola Towle UNISON national officer, LGBT equality, direct dial phone number 0207 121 5241.

Flexible working: legal rights and gaps in the law (December 2016), available at www.unison.org.uk/content/uploads/2017/01/Flexible-Working-Guide-Jan-2017.pdf

Law and practical negotiating suggestions.
Companion to 'Flexible working: making it work'.

Flexible working: making it work

Practical negotiating and campaigning guide,
available at www.unison.org.uk/content/uploads/2014/09/On-line-Catalogue225422.pdf

Negotiating for working parents

Bargaining guide available at www.unison.org.uk/content/uploads/2016/05/Negotiating-for-working-parents.pdf

Proving Disability and Reasonable Adjustments. Edition 7 (Sept 2018).

www.unison.org.uk/about/what-we-do/fairness-equality/disabled-members/

UNISON Race Discrimination Protocol

Download from www.unison.org.uk

UNISON Factsheets and Resources

Visit www.unison.org.uk/for-activists/help-and-advice/supporting-members/negotiating-and-bargaining/ for a range of in-depth guides to support effective negotiating and bargaining with employers including:

- LGB workers' rights factsheet
- Pregnancy: Your rights at work guide
- Menopause factsheet
- Public Sector Equality Duty factsheet
- Transgender workers' rights factsheet

Other guides

Pay and ethnicity

Is racism real? A report about the experiences of Black and minority ethnic workers. (TUC 2017)

www.tuc.org.uk/sites/default/files/Is%20Racism%20Real.pdf

Government consultation on ethnicity pay reporting (closed January 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747546/ethnicity-pay-reporting-consultation.pdf

Research report 108: The ethnicity pay gap (Equality and Human Rights Commission. 2017)

www.equalityhumanrights.com/en/publication-download/research-report-108-ethnicity-pay-gap

Equal pay

UNISON's resources on the gender pay gap

www.unison.org.uk/our-campaigns/bridgethegap/

Closing the gender pay gap (EHRC 2018)

www.equalityhumanrights.com/en/publication-download/closing-the-gender-pay-gap

Managing gender pay reporting (ACAS and GEO. 2019)

http://m.acas.org.uk/media/pdf/9/p/Managing_gender_pay_reporting_07.02.19.pdf

Gender pay data supplied by employers can be searched on-line at <https://gender-pay-gap.service.gov.uk/>
A summary report on data from the first year is at www.gov.uk/government/publications/gender-pay-gap-information-regulations-summary-of-201718-data

Gender differences in commute time and pay (ONS)

www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/genderdifferencesincommutetimeandpay/2019-09-04

Sexual harassment

Sexual harassment in the workplace (House of Commons Women and Equalities Committee. 2018)

<https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm>

Pregnancy and maternity

Pregnancy and maternity-related discrimination and disadvantage: experiences of employers (EHRC 2016)

www.equalityhumanrights.com/sites/default/files/uploads/EMPLOYERS%20REPORT%20-%20BIS-16-147-pregnancy-and-maternity-related-discrimination-and-disadvantage-experiences-of-employers.pdf

Pregnancy and maternity-related discrimination and disadvantage: experiences of mothers (EHRC 2016)

[www.equalityhumanrights.com/sites/default/files/uploads/MOTHERS%20REPORT%20-%20BIS-16-146-pregnancy-and-maternity-related-discrimination-and-disadvantage-experiences-of-mothers%20\(1\).pdf](http://www.equalityhumanrights.com/sites/default/files/uploads/MOTHERS%20REPORT%20-%20BIS-16-146-pregnancy-and-maternity-related-discrimination-and-disadvantage-experiences-of-mothers%20(1).pdf)

The EHRC recommendations and government response are available at

www.gov.uk/government/uploads/system/uploads/attachment_data/file/509571/bis-16-148-government-response-to-recommendations-by-EHRC-on-pregnancy-and-maternity-related-discrimination.pdf

Pregnancy and Maternity Discrimination at Work (House of Commons Women and Equalities Select Committee. 2016)

www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/news-parliament-2015/pregnancy-and-maternity-report-published-16-17/

Menopause

UNISON page on menopause on its website

www.unison.org.uk/about/what-we-do/fairness-equality/women/key-issues/menopause/

The menopause: a workplace issue (Wales TUC survey, 2017)

www.tuc.org.uk/research-analysis/reports/menopause-workplace-issue-wales-tuc

Menopause: UNISON Guidance and Model Policy

www.unison.org.uk/content/uploads/2019/10/25831.pdf

The effects of menopause transition on women's economic participation in the UK (DoE research report, 2017)

www.gov.uk/government/publications/menopause-transition-effects-on-womens-economic-participation

Menopause at Work: a survey to look at the impact of menopausal and perimenopausal symptoms upon women in the workplace (Newson Health Menopause & Wellbeing Centre, 2019)

[https://d2931px9t312xa.cloudfront.net/menopausedoctor/files/information/323/Lewis%20%20Newson%20BMS%20poster%20SCREEN%20\(1\).pdf](https://d2931px9t312xa.cloudfront.net/menopausedoctor/files/information/323/Lewis%20%20Newson%20BMS%20poster%20SCREEN%20(1).pdf)

ACAS guidance: Menopause at work

www.acas.org.uk/index.aspx?articleid=6752

Trans workers

ACAS Research Paper: Supporting Trans Employees in the Workplace

<http://m.acas.org.uk/media/pdf/6/f/Supporting-trans-employees-in-the-workplace.pdf>

The recruitment and retention of transgender staff: Guidance for employers (Government Equalities Office. 2015)

www.gov.uk/government/publications/recruiting-and-retaining-transgender-staff-a-guide-for-employers

The workplace and gender reassignment: Guide for staff and managers, produced by a:gender (the Civil Service transgender support network) (GOV.UK 2016)

www.gov.uk/government/publications/the-workplace-and-gender-reassignment

The cost of being out at work (TUC)

www.tuc.org.uk/sites/default/files/LGBTreport17.pdf

Government consultation on reform of the Gender Recognition Act

www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004

Websites

UNISON

www.unison.org.uk

Equality and Human Rights Commission

www.equalityhumanrights.com

